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91-1798

No. _____

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1991

VILLAGE OF LOS RANCHOS DE ALBUQUERQUE, *et al.*,

*Petitioners,*

v.

JOHN O. MARSH, SECRETARY OF THE DEPARTMENT OF THE ARMY, *et al.*,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI

WILLIAM G. WALKER
*Counsel of Record for Petitioners*

DOUGLAS L. HAYES
WALKER & VAN HEIJENOORT
150 Louisiana Blvd. NE
Albuquerque, NM 87108
(505) 268-4551

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED

1. WHAT IS THE PROPER STANDARD OF REVIEW OF AN AGENCY'S EXECUTION OF ITS DUTY UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT TO DETERMINE WHETHER A KNOWN IMPACT IS SIGNIFICANT BEFORE DECIDING NOT TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT.

## PARTIES

VILLAGE OF LOS RANCHOS de ALBUQUERQUE; ANNE BULLOCK; STEVEN RUFFENACH; EDWARD BANKS; BILL DERR; R.E. CLARK; ANN CLARK; CONRAD STACK; ARNOLD SARGEANT; KIT SARGEANT; RIO GRANDE VALLEY PRESERVATION SOCIETY,

Petitioners,

v.

JOHN O. MARSH, Secretary of the Department of the Army; MICHAEL J. DEBOW, Lieutenant Colonel, District Engineer for the Albuquerque District of the Army Corps of Engineers; FRANK DUNKLE, Director of the U.S. Fish and Wildlife Service; MANUEL LUJAN, JR., Secretary of the Department of the Interior; HENRY J. HATCH, Lieutenant General, Chief of Engineers of the Corps of Engineers; MICHAEL SPEAR, Regional Director of Region 2 (Southwest Region) of the Fish and Wildlife Service; CITY OF ALBUQUERQUE,

Respondents.

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The petitioners, Village of Los Ranchos de Albuquerque, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.[1]

## OPINIONS BELOW

The Supplemental *En Banc* Order on Petition for Rehearing and Suggestion for Rehearing *En Banc*, App. 1a,[2] is reported at 956 F2d 970 (10th Cir. 1992). The original Order and Judgment of the court of appeals, App. 8a, is unreported. *See* table, 947 F2d 955 (10th Cir. 1991). The decision and memoranda opinions of the district court are unreported. App. 19a, 20a, 26a, 30a, 67a, and 70a.

## JURISDICTION

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit, affirming the decision of the trial court, was entered October 24, 1991. App. 8a. The

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[1] The Tenth Circuit Court of Appeals heard this case under three case numbers. The cases presented identical issues and the circuit court issued one opinion for all three case numbers.

[2] Throughout this Petition, documents found in the Appendix are cited by page number (e.g., "App. 31a"). The transcript is cited by page (e.g., "Tr. 50"), and the Administrative Record is cited by volume and page (e.g., "AR Vol. I, p. 25").

denial of rehearing and supplemental *en banc* order was entered February 11, 1992. App. 1a. Jurisdiction is conferred on this Court by 28 USC § 1254(1) to review the order and judgment by writ of certiorari to the Tenth Circuit Court of Appeals.

The jurisdiction of the United States District Court for the District of New Mexico was invoked pursuant to 28 USC § 1331 (federal question), 28 USC § 1361 (mandamus), and 5 USC §§ 702, 704 (Administrative Procedures Act). The jurisdiction of the court of appeals was invoked pursuant to 28 USC § 1291.

## RELATED CASES

*Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F2d 1477 (10th Cir. 1990), *cert. denied*, 111 SCt 1017 (1991).

*City of Albuquerque v. State ex rel. Village of Los Ranchos de Albuquerque*, 111 NM 608, 808 P2d 58 (Ct. App. 1991), *cert. denied*, March 20, 1991 (NM Bar Bulletin, Vol. 30, No. 13, p. 229); *State ex rel. Village of Los Ranchos de Albuquerque v. City of Albuquerque*, New Mexico Court of Appeals, No. 13570.[3]

[3] All development of the project in question (known as the Montaño Project) was halted in May, 1989 by a preliminary injunction from a state district court. The lawsuit has been dismissed following a New Mexico Court of Appeals interlocutory decision that a highway project can never be a public nuisance *per se*. The injunction remains in effect pending final appeal.

## CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED


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| Corps NEPA Implementation Procedures (1991) 33 CFR § 230.10 | 98a |
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| Corps NEPA Implementation Procedures for the Regulatory Program (1991) 33 CFR App. B.7 (partial) | 102a |
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## STATEMENT OF THE CASE

### NATURE OF THE CASE

The City of Albuquerque (City) proposes to build a roadway and bridge through the Rio Grande bosque[4] and

[4] "Bosque" is translated from Spanish as "forest." The bosque along the Rio Grande is a rich floodplain and riparian

(Continued on following page)

across the Rio Grande at Montaño Road (Montaño Project) three miles north of the Interstate 40 (I-40) river crossing and three miles south of the Paseo del Norte (Paseo) river crossing. The Montaño Project contemplates a two-lane bridge which will, according to competent evidence presented in this case: bisect and fracture core wildlife habitat of a previously unbroken six-mile stretch of the Rio Grande riparian bosque; directly destroy approximately four acres of bosque; take, use, and damage portions of the John Simms New Mexico State Cultural Property and Los Poblanos National Historic District; and impact long-established neighborhoods and communities adjacent to the roadway and bridge.

Petitioners, a New Mexico municipality, an environmental public interest group, and individuals who use the bosque and historic sites at the project location (hereinafter collectively the Village), brought suit for declaratory and injunctive relief under the Clean Water Act, 33 USC § 1251 *et seq.*, the National Environmental Policy Act (NEPA), 42 USC § 4321 *et seq.*, the National Historic Preservation Act (NHPA), 26 USC § 470 *et seq.*, the Administrative Procedures Act (APA), 5 USC § 701 *et seq.*, and the Fish and Wildlife Coordination Act, 16 USC § 661 *et seq.* The suit challenged the adequacy and accuracy of the environmental and public interest reviews conducted

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(Continued from previous page)

forest which supports abundant wildlife. While accounting for less than one-tenth of one percent of wildlife habitat in the southwest, riparian habitat such as the Rio Grande bosque is obligate to 60 to 70 percent of southwestern wildlife. AR Vol. VIII, at 89.

by the U.S. Army Corps of Engineers (Corps), the Fish and Wildlife Service (FWS), and the City in relation to a dredge and fill permit issued pursuant to § 404 of the Clean Water Act, 33 USC § 1344. It specifically challenged the bases of the Corps' Finding of No Significant Impact (FONSI), 40 CFR § 1508.13, the failure to prepare an Environmental Impact Statement (EIS) under NEPA, the failure to independently verify data and analyses, and the issuance of a dredge and fill permit pursuant to § 404. The Village also challenged the FWS recommendations regarding mitigation under the Fish and Wildlife Coordination Act. 16 USC § 661 *et seq*. The City was dismissed from the suit May 8, 1989 and is no longer a party. App. 70a.

## HISTORY OF THE PROJECT AND CASE

The Rio Grande and its appurtenant bosque runs north to south along the west side of the City of Albuquerque and the Village of Los Ranchos de Albuquerque, which adjoins the City along its northern boundary near the river. In 1979 there were two bridges comprising eight lanes (six at I-40 and two lanes at Alameda eight miles to the north) crossing the river in the northern part of the City. At that time, the City, State of New Mexico, Bernalillo County, and Federal Highway Administration (FHWA) determined that six new river crossing lanes were needed in this area in addition to the eight existing lanes. In 1983 the decision was made to build a two-lane bridge at Montaño Road and a four-lane bridge farther north at Paseo del Norte Road. Both bridges would cut through the Village.

The Village then brought suit challenging the FHWA EIS, and in settlement, the State, County and FHWA agreed to convert the Paseo Project from four to six lanes and not to build or contribute funds to the Montaño project. The City decided to build Montaño on its own and applied for a § 404 permit from the Corps in April, 1986. The Corps prepared an Environmental Assessment (EA)[5] in June, 1987.

Neither the FHWA EIS prepared in 1983, nor any of the studies utilized in 1979, contemplated the six lanes now open at Paseo. Similarly, the Corps' EA fails to consider the effect of recent projects adding four more lanes at I-40 (for a total of ten, currently under construction) and two more lanes at Alameda (for a total of four, currently under construction). During the public process for the § 404 permit, the Village, scientists, experts and others repeatedly warned the Corps that the FHWA EIS was inadequate because of its failure to study fracturing of wildlife habitat, impacts to historic properties, noise impacts, and secondary and cumulative impacts. Despite strong urging from the Corps' contract expert on wildlife and the FWS that the study of fracturing and wetlands was inadequate or erroneous, the Corps refused to prepare an EIS and instead issued the permit on July 6, 1987,

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[5] An EA is a document agencies use to support the decision whether to prepare an EIS. That is, the EA helps the agency determine whether the impacts "significantly affec[t] the quality of the human environment." 42 USC § 4332(2)(C). An EA is less rigorous than an EIS. *See* 40 CFR § 1508.9, 1508.27; 33 CFR § 230.10; 46 Fed Reg 18026, 18037 (1981), Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 36a & 36b.

supported by an EA, Public Interest Determination, 33 CFR § 320.4, and FONSI, 40 CFR § 1508.13. AR Vol. I-A, I-B.

The Village then filed this suit, including a motion for preliminary injunction. The Corps filed the Administrative Record (AR) on March 30, 1989. On May 8, 1989, the district court issued a protective order sharply limiting discovery and presentation of new evidence, and setting a "*very limited* evidentiary hearing in conjunction with the preliminary injunction hearing," to determine whether additional evidence on the issue of fracturing the bosque would be appropriate. App. 68a (emphasis in original). The court denied motions to reconsider the protective order on May 11, 1989, and May 16, 1989. App. 29a.

At the hearing, the court permitted evidence only on narrow elements of the issue of fracturing of habitat. Evidence of, e.g., noise impacts on fracturing and historic properties was excluded. Tr. 329-30, 493 (App. 27a-29a). The court denied the motion for a preliminary injunction on May 26, 1989. App. 30a. The respondents filed a motion for summary judgment. The Village filed a response and its own motion for summary judgment supported by transcripts, affidavits, and depositions. The court entered summary judgment in favor of respondents on November 30, 1989. App. 20a.

On February 28, 1990, the district court entered final judgment granting relief to the respondents and denying all relief to the Village. App. 19a. All petitioners filed timely notices of appeal against all respondents in the

Tenth Circuit Court of Appeals.[6] After briefing and oral argument, the court of appeals affirmed in an unpublished Order and Judgment on October 24, 1991. App. 8a. The Village timely filed a petition for rehearing with a suggestion for rehearing *en banc* on December 9, 1991. On February 11, 1992, the court of appeals denied the petition for rehearing and issued a supplemental opinion *en banc*. App. 1a.

In the decision below the court changed the standard of review of agency action in the Tenth Circuit and specifically reversed all the major NEPA decisions in the circuit since 1973. App. 6a. The overruled standard "on the threshold NEPA issues of major federal action and significant impact" evaluated the "legal conclusion" whether an agency's action was "reasonable in the light of the mandatory requirements and high standards of [NEPA]." *Sierra Club v. Hodel*, 848 F2d 1068, 1088-89 (10th Cir. 1988) (*citing Baltimore Gas & Electric Co. v. NRDC, Inc.*, 462 US 87, 97-98 (1983) for the mandatory requirement of "hard

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[6] The Village presented detailed new analyses by Dr. Robert McNeill (vibration impacts to historic properties), Dr. George Wilson, Wilson Ihrig & Associates (noise impacts to bosque and nature center), Dr. Robert Ohmart (fracturing impacts), and Dr. William Siembieda (transportation need and alternative studies), to the Corps District Engineer on July 23, 1991, with a request for a reevaluation of the circumstances and conditions of the permit pursuant to 33 CFR § 325.7. *See* 40 CFR § 1502.9. The District Engineer refused to reevaluate the permit on December 12, 1991. The Village then submitted a Freedom of Information Act request to the Corps asking for all documentation relating to the Corps' decision not to reevaluate the permit. The December 19, 1991 response to the request stated that no such documents exist.

look" and "adequate consideration" of "every significant impact"). Decisions such as significance or hard look were viewed as legal conclusions and reviewed *de novo*. When using the new standard of review the court treats all analysis and *decisions or conclusions* by the agency, such as whether an impact is significant, whether alternatives are adequately studied or whether a hard look is taken, as exclusively factual questions and does not engage in a *de novo* review of these legal conclusions. The court then applies a "highly deferential" review to these issues. 956 F2d 970, App. 6a, *citing Goos v. I.C.C.*, 911 F2d 1283, 1292 (8th Cir. 1990). *See also*, App. 11a-13a.

## ARGUMENT

### I. REVIEW SHOULD BE GRANTED BECAUSE THE CIRCUIT COURTS ARE IN CONFLICT OVER THE STANDARD OF REVIEW OF AND DEGREE OF DEFERENCE TO BE GIVEN TO AN AGENCY ANALYSIS AND DECISION NOT TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT.

The proper standard of review of a decision not to prepare an EIS is a source of long-standing division between the circuit courts of appeal.[7] That split was

[7] On at least two different occasions this Court has declined review of this issue. *River Road Alliance, Inc. v. Corps of Engineers*, 475 US 1055 (1986) (White, J., dissenting); *Gee v. Boyd*, 471 US 1058, 1060 (1985) (White, Brennan, Marshall, J.J., dissenting) (dissenters: the difference is "not merely semantic or academic" but is significant and justifies review).

recognized but not resolved by the decision of this Court in *Marsh v. Oregon Natural Resources Council*, 490 US 360, 375-78 & n.23 (1989). Because of the different methodologies being applied, different results in similar fact patterns are occurring.[8] This petition presents a clean opportunity for the resolution of a troublesome divergence in applicable law.

### A. THE BETTER REASONED ANALYSIS REVIEWS AGENCY CONCLUSIONS ON THRESHOLD ISSUES *DE NOVO*.

Some courts and federal agencies have labelled the differing standards of review as "reasonableness" (reflecting a *de novo* review of legal conclusions; searching and substantial review) versus "arbitrary and capricious" (a highly deferential review of factual determinations of the agency). The better-reasoned cases invariably give deference to agency expertise when it is due but search for well-reasoned analysis and decisions that conform to

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[8] *Compare, e.g.*, the case at bar with *Sierra Club v. Peterson*, 717 F2d 1409 (D.C. Cir. 1983), in which the facts are very similar but the results are different. This can occur even within the same circuit. *Compare, Van Abbema v. Fornell*, 807 F2d 633, 642 (7th Cir. 1986) with *River Road Alliance, Inc. v. Corps of Engineers*, 764 F2d 445 (7th Cir. 1985), *cert. denied*, 475 US 1055 (1986). Ostensibly applying the same standard, two different panels of the same circuit evaluated Corps' permits for different barge loading facilities but employed sharply divergent processes to accomplish opposite results. In *River Road*, 764 F2d at 454, the dissent by Wood, J., sharply criticized the majority's award of unbridled discretion to the Corps. In *Van Abbema* the court found factual ambiguities and did not give discretion to the Corps to resolve them.

the letter and spirit of NEPA. It is this balanced, logical standard that this Court should adopt.[9]

The duty to prepare an EIS is mandatory whenever "*any* 'significant' environmental impacts might result from the proposed agency action. . . . " *Peterson*, 717 F2d at 1415 (applying four part arbitrary or capricious test); 42 USC § 4332(C)(2). Every circuit has labored in its attempt to determine the applicable standard of review, the criteria within the standard, and the means to ensure compliance without substituting its judgment for that of the agency.[10]

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[9] *See* Hoskins, *Judicial Review of an Agency's Decision Not to Prepare an Environmental Impact Statement*, 18 Envtl. L. Rep. 10331 (1988). In a detailed analysis of the circuits' positions, the Assistant to the General Counsel, Department of the Army, argues persuasively that a more searching standard than that applied by the highly deferential courts is required to enforce the environmental scheme of NEPA. In urging adoption by this Court of the reasonableness review he notes that the continuing confusion caused by the different standards is significantly interfering with agency decision-making. *Id.* at 10347.

[10] An excellent analysis of this "awkward legal animal" is found in *Sierra Club v. Marsh*, 769 F2d 868, 870-72 (1st Cir. 1985) in which the court finds that the APA review standards were intended to be applied by the district court to a record created before it rather than in the agency. Confusion has followed the substantial change in practice that has occurred since the APA was drafted. The review standards derive from the APA, 5 USC § 706(2), which maintains that a reviewing court shall:

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . .

* * *

(D) without observance of procedures required by law; . . . .

Historically, the majority of circuits reviewing a decision not to prepare an EIS have focused on the mandatory duty under NEPA to identify significant impacts and have subjected "these threshold determinations to the higher scrutiny on review." *Township of Lower Alloways Creek v. Public Service Electric & Gas Co.*, 687 F2d 732, 742 (3d Cir. 1982) (*quoting, Concord Township v. United States*, 625 F2d 1068, 1073-74 (3d Cir. 1980).

The District of Columbia, First, Third, Fifth and Ninth Circuits (and, until *Marsh v. Oregon Natural Resources Council, supra*, the Eighth, Tenth and Eleventh Circuits as well), basically view the agency analysis and decision whether to prepare an EIS as entitled to less deference than is given to the EIS or supplemental EIS process. To reach a decision, the court reviews the EA and AR, takes evidence at trial, reviews opponent's expert's analysis and conclusions, and then searches carefully for any impact that "may," *Fritiofson v. Alexander*, 772 F2d 1225, 1237-38 (5th Cir. 1985), "could," *Sierra Club v. Marsh*, 769 F2d at 870-72; or "might," *Peterson*, 717 F2d at 1415, result in a significant impact. If a possible significant impact is found, the court then looks for convincing evidence that the impact can be mitigated to insignificance or that the agency retains authority to preclude or prohibit the activity or withdraw a permit at a later date. If "the agency's review was flawed in such a manner that it cannot yet be said whether the project may have a significant impact," *Fritiofson*, 772 F2d at 1237-38, or the agency's action is irretrievable and a possibility remains that the impact will be significant, the court must remand to the agency for specific study or, in the Fifth Circuit, for EIS preparation. *Peterson*, 717 F2d at 1415; *Sierra Club v. Marsh*, 769 F2d at 870-72; *Lower Alloways Creek*, 687 F2d at

742; *Fritiofson*, 772 F2d at 1237-38; *Sierra Club v. U.S. Forest Service*, 843 F2d 1190, 1192-95 (9th Cir. 1988).[11]

The object of this standard is to insure that agencies do not take uninformed major federal action. If an agency fails or refuses to make a determination on the significance of a known impact, or to identify an impact that may be significant, or to adequately study an impact, then a generous grant of deference will permit decisions without sufficient information or analysis. In that event "[t]he spirit of the Act would die aborning . . . [because the agency's actions] were too well shielded from impartial review." *Save Our Ten Acres v. Kreger*, 472 F2d 463, 466 (5th Cir. 1973).

### B. EFFECTIVE JUDICIAL REVIEW IS DENIED WHEN LEGAL CONCLUSIONS ARE TREATED AS FACTUAL DISPUTES AND GREAT DEFERENCE IS CONFERRED ON THE AGENCY.

In contrast, five circuits review the agency decision not to prepare an EIS utilizing a standard that is highly deferential to agency expertise. This standard gives the agency great discretion in deciding its jurisdiction, its selection of possible impacts to review, the extent and thoroughness of that review, and the ultimate conclusion on impacts. At the most extreme, wholesale deference is given to the agency's view of facts, alternatives, need and

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[11] *See also, Oregon Natural Resources Council v. Marsh*, 832 F2d 1489, 1494 (9th Cir. 1987), *rev'd on other grounds*, 490 US 360 (1989) (cumulative impacts evaluation in EIS reviewed for reasonableness, issue not appealed to this Court).

public interest. App. 1a, 8a. *See City of Alexandria v. Federal Highway Administration*, 756 F2d 1014, 1020-21 & n.6 (4th Cir. 1985); *River Road*, 764 F2d at 449 (*see* dissent, Wood, J., 764 F2d at 454-58) (court applied the broadest deference); 33 CFR § 320.4.[12]

Three circuits have rejected and overruled a long-standing standard of review based solely on this Court's decision in *Marsh v. Oregon Natural Resources Council*, 490 US at 375-77 & n. 23. That decision applied a deferential standard because of the "classic . . . factual dispute" involving a "high level of technical expertise." *Id.* at 376-77. Although the decision was specifically limited to the "narrow question before [the Court] whether" the Corps needed to supplement an already supplemented EIS, *id.* at 375-76, these circuits have read it extremely broadly to state that the review standard "gives an appellate court the least latitude in finding grounds for

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[12] Two circuits are less clear in the standard applied. The Second Circuit uses a two-part test which includes deference to the agency in areas of its particular expertise but requires reasoned justification otherwise and permits extensive extra-record evidentiary development. *Town of Orangetown v. Gorsuch*, 718 F2d 29, 34-35 (2d Cir.), *cert. denied*, 465 US 1099 (1983) (*citing with approval, Hanly v. Kleindienst*, 471 F2d 823, 829-30 (2d Cir. 1972), *cert. denied*, 412 US 908 (1973)). The *Hanly* court set out a two-part test in which it held that the meaning of "significantly" was a legal question for *de novo* review. It generally deferred to the agency but required it to determine "the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm. . . . " *Id.* at 830-31. *See also, Boles v. Onton Dock, Inc.*, 659 F2d 74 (6th Cir. 1981) (applied arbitrary or capricious standard but minimized difference between standards and substantially deferred to agency evaluations).

reversal" and that this highest possible level of deference to the agency applies at nearly all stages of NEPA review. *North Buckhead Civic Ass'n v. Skinner*, 903 F2d 1533, 1538-39 (11th Cir. 1990); *Goos*, 911 F2d at 1291-92 (NEPA reviews are factual disputes except for agency decision on "major federal action," *reaffirming Winnebago Tribe of Nebraska v. Ray*, 621 F2d 269, 271 (8th Cir.), *cert. denied*, 449 US 836 (1980)); *Village of Los Ranchos v. Marsh*, 956 F2d 970 (10th Cir. 1992), App. 1a (significance of NEPA-based actions is factual; overruled seven prior decisions as "inconsistent with *Marsh*").

The better reasoned cases, however, all recognize that different levels of deference should apply at different stages of NEPA and that "significant" and "hard look" are legal conclusions in the context of whether to prepare an EIS. When reviewing an EA, the court should necessarily give less deference to the agency than when reviewing an EIS. An EA is by its very nature more speculative and should be subject to more searching review. *See State of Louisiana v. Lee*, 758 F2d 1081, 1084 (5th Cir. 1985), *cert. denied*, 475 US 1044 (1986); Hoskins, *supra*, at 10347.

Applying a high level of deference to agency analysis and conclusions in a summary judgment review exacerbates the problem. In entering summary judgment for respondents, the district court gave great deference to the Corps' analysis and decision that although it could not determine whether habitat fracturing was a significant impact without study, it did not need such a study because it had hopefully guessed right about how to mitigate the unknown impacts. *See* App. 12a and 24a. This deference effectively ratified the Corps' refusal to

investigate the repeated warnings from a consensus of experts that fracturing is significant generally, would be devastating in this unusually rich and fragile area, and that the FHWA and Corps had not adequately studied the impact. Summary judgment employing the court's new standard of review and resolving factual conflicts in favor of the movant conflicts with *United States v. Diebold*, 369 US 654, 655 (1962) and *Anderson v. Liberty Lobby*, 477 US 242, 249 (1986). Its use precluded a meaningful review of petitioners' claims and thus violated their right to due process. U.S. Const. amend. V.[13]

This conflict has raged in the circuits almost the entire life of NEPA and is devolving into a chaotic rearrangement of review standards and overruling of apparently settled law. This petition presents the Court with an

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[13] The normally strong safeguards to protect the non-movant in summary judgment disappear in the highly deferential standard of review employed below. For example, normally, the burden of clearly establishing the lack of any triable issue of fact is on the moving party. *Moore's Federal Practice*, ¶ 56.15[3]. The non-movant's version of facts must be accepted and all disputed matters must be resolved in his favor. *Diebold*, 369 US at 655. Discretion plays no part in granting summary judgment. *Moore's Federal Practice* ¶¶ 56.15[1], [3] & [6]; 56.27. *See Avia Group International, Inc. v. L.A. Gear*, 853 F2d 1557, 1560-61 (Fed. Cir. 1988). Discovery, severely limited here, is particularly helpful when obtaining factual data as a basis in opposing motions for summary judgment. *Moore's Federal Practice*, ¶¶ 26.02[4], 56.11. Moreover, summary judgment is especially inappropriate when the case involves important and complex public issues. *See Bd. of Education, Island Trees Union Free School Dist. No. 26 v. Pico*, 457 US 853 (1982).

opportunity to end the "disarray" in the circuits. *See, Gee,* 471 US at 1060 (White, J., dissenting).

## II. REVIEW SHOULD BE GRANTED BECAUSE THE WRONG STANDARD OF REVIEW WAS APPLIED OR THE CORPS' DECISION RECEIVED UNDUE DEFERENCE.

The courts that have ruled in the case at bar read *Marsh* as dictating a highly deferential standard of review at all stages of NEPA review. App. 12a; App. 36a. The Corps' methodology and conclusory analysis is adopted without a searching inquiry into the validity of the underlying information and without giving the Village a meaningful opportunity to demonstrate the Corps' error. Inaccuracy, staleness, avoidance of mandatory decision-making, and lack of information vital to a significant impacts analysis were ignored in the rush to deference.

### A. THE CORPS IS REQUIRED TO MAKE CERTAIN DETERMINATIONS IN ORDER TO COMPLY WITH NEPA.

An agency fails in its mandatory duties under NEPA when it: 1) refuses or fails to study a potentially significant impact; 2) inadequately studies a potential impact; 3) uses or adopts inapplicable or implausible analyses from another agency or the proponent; or 4) refuses to make a decision on significance of an impact. The Village's ability to show these failures was unfairly limited both by the restrictions on discovery and presentation of evidence and by the degree of deference given to the Corps.

In this case the Corps failed to meet its obligations under NEPA. The Village is prepared at full briefing to demonstrate that:

1) the EA and AR failed to satisfy the mandatory duty to determine the level of significance of "fracturing"[14] of the core wildlife habitat at Montaño, *see discussion* at II.B. below;

2) the Corps' and courts' conclusion that, on balance, the City's desire for the project outweighs the unknown significance, relates only to the Clean Water Act's public interest analysis, *see* 33 CFR § 320.4, and is an inadequate resolution of NEPA's mandate to determine significance of impacts;

3) that at trial it can establish that the failure to identify that the historic buildings immediately adjacent to the construction site were made of unreinforced tile and adobe and that vibration from construction would imperil them violated NEPA and NHPA strictures;

4) that at trial it can establish that the refusal to reconsider the earlier conclusion on the historic properties after the State Historic Preservation Officer invoked the reconsideration process and the Corps was presented with an unrefuted study that the buildings were imminently endangered violates NEPA and NHPA;

5) the Corps' adoption of the 1983 FHWA EIS noise study and other data as adequate was arbitrary and unreasonable;

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[14] "Fracturing" means to divide a habitat into smaller and smaller areas, thereby destroying its value as wildlife habitat.

6) that the rejected affidavit of Dr. Wilson, which details by a site specific, ambient noise study that the change in noise levels in the bosque, historic district and surrounding neighborhoods, would be significant under official FHWA guidelines, is sufficient basis for rejecting the EA conclusion or requiring supplementary study; and

7) that at trial it can establish that the supplementary studies by Dr. Wilson and Dr. Ohmart provide irrefutable evidence that numerous neotropical migrant bird species in the adjacent wildlife habitat and refuge will be irreparably and very possibly significantly impacted by the increase in noise levels in the area.

## B. THE FAILURE OF THE CORPS TO TAKE A HARD LOOK AT AND DETERMINE THE LEVEL OF SIGNIFICANCE OF IMPACTS OF THE HABITAT FRACTURING REQUIRES VACATING THE § 404 PERMIT AND REMAND TO THE CORPS FOR AN ADEQUATE ANALYSIS.

Fracturing of the riparian wildlife habitat is one good example of the Corps' failure to take a hard look at potentially significant impacts. The Corps was aware that a potentially significant impact existed; failed to do a study of its own; refused to listen to experts at its disposal; adopted absurd and irrelevant data; and failed to make a determination of the level of significance.

The project will fracture an unbroken six-mile linear stretch of bosque. Every expert biologist that reviewed or commented on the Corps' analysis warned the Corps that the impacts were likely to be significant and there is not

enough data to currently evaluate the impact of fracturing the bosque at Montaño.[15] The Corps was on fair notice that experts were vitally concerned about the probable fracturing impacts to the bosque and the lack of data to make conclusions about those impacts. This is not a conflict of experts over the significance of impact; rather, there is a consensus among experts warning that not enough data exists to make a determination on the significance of an issue that all agree is important and requiring of study before granting a permit. *See Foundation for North American Sheep v. U.S. Dept. of Agriculture*, 681 F2d 1172, 1182 (9th Cir. 1982) (controversy, as stated in CEQ definition of significant, 40 CFR § 1508.27(b)(4), is especially important factor when *every* expert questions the agency action).

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[15] AR Vol. VII, at 1128 (letter from Dr. Ohmart, the Corps' contract biologist, warning that there is no adequate analysis of fracturing); AR Vol. VII, at 1125, (letter from Dr. Cully, now of FWS, citing lack of scientific analysis of the site and warning that "fragmentation of habitat patches results in the loss of plant and animal species"); AR Vol. III, at 197 (letter from FWS warning "completion of the bridge will also destroy the integrity of a large tract of riparian forest, thus making the area less valuable to wildlife"); AR Vol. VIII, at 143 (Prof. Findley, Director, Museum of Southwestern Biology, warning that Montaño Project could be the final devastating fracture which will destroy habitat value of bosque); AR Vol. VIII, at 146 (Prof. Martin, University of New Mexico Biology Dept., warning that impacts from bridge will extend far beyond bridge site); and AR Vol. VIII, at 133-36 (Dr. Haffner, Chairman, Science Dept., New Mexico Museum of Natural History, warning that this is one of the more pristine sections of the narrow linear band of bosque and that there has been no study of the impacts on the wildlife at that site).

The Corps, rather than properly studying the fracturing impacts, misused a two-year intensive biological survey of the bosque it had commissioned in 1984 (the "Hink & Ohmart Study," AR Vol. XIII).[16] The EA and AR are replete with references to the study as justification for the Corps' analysis. When Dr. Ohmart, Professor of Biology at Arizona State University, became aware of the attempt to use the study for the Montaño site, he repeatedly warned the Corps that an analysis of data from this site had not been done and a full study was necessary to determine significance.[17] At the preliminary injunction hearing, when the court allowed some evidence beyond the AR on fracturing impacts, petitioners called Dr. Ohmart to testify. He testified extensively on the Corps' lack of scientific data to support conclusions about the significance of fracturing impacts, and what a proper study would entail. Tr. 201-06, 213-15, 222-23, 275-80, 283-89. He was also particularly chagrined by the Corps' misuse of his survey and strongly objected to its use to validate the Corps' fracturing analysis. Tr. 202-03.

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[16] The Hink & Ohmart study was completed in June 1984. It investigated the broad wildlife values of the bosque and the impacts of improving 60 miles of Corps levees along the Rio Grande. The levees run parallel to the river and therefore present a substantially different impact than a crossing which cuts laterally across the river. Tr. 202-03.

[17] AR Vol. II, at 76 (Hink & Ohmart study warns to avoid fracturing); AR Vol. VII, at 1128-34 (bridge can shatter gene pool, certain birds' habitat will be endangered); AR Vol. X, at 74-78, 248-71 (ecological information relied on in FHWA EIS and by City is out of date); AR Vol. VIII, at 87-94.

This is not a factual dispute between experts, the resolution of which implicates substantial agency expertise. Rather, Dr. Ohmart is the only expert biologist the Corps relied upon to support its conclusions. The primary information collector for the Corps was Ms. Manger, a Corps biologist, who prepared the EA and AR, and made the FONSI recommendation to the District Engineer. Tr. 92-93. Her recommendations on impact significance and mitigation became, by default, the primary "studies" done by the Corps. Tr. 93. Her educational background, which includes a B.S. in elementary education, an M.S. in teaching science with concentration in biology and approximately seven biology courses, Tr. 94, does not qualify her as an expert on habitat fracturing or its impacts in any sense. She admitted that she has "minimal" knowledge of the biological concept of habitat fracturing, and no expertise in the subject. Tr. 98-99. Moreover, the proponent City provided no greater expertise to the Corps to support its application. Its environmentalist, Mr. Dan Warren, has only a bachelor's degree in Biology. Tr. 51. Nevertheless, despite all indications that there was insufficient data to gauge the fracturing impact at all, and certainly not enough data to reach a conclusion that the impact would be insignificant, the deference shown to her analysis effectively precluded searching review.

In the EA the Corps admits that the bridge will fracture the bosque into several small ecosystems ranging from 140 acres to 360 acres and that areas of 500 to 1000 acres are considered "extremely small for purposes of ecosystem integrity." AR Vol. I-B, at 25 (EA). Inexplicably, because there is no data to support it in the AR or from

any of the experts, the Corps concludes that the impact is "minor," and then, absurdly, that the impact should be mitigated "due to its scarcity in the region and its ecological value." AR Vol. I-B, at 11 (EA). This casual and contradictory analysis of impacts when a resource as important as the bosque habitat is at stake is unconscionable.

The Corps relies heavily on assumed benefits of planned mitigation to allay the significance of the fracturing impacts. AR Vol. I-B, at 25 (EA). The value of this mitigation is completely speculative. Ms. Manger, the progenitor of the mitigation plans, admits that while she is qualified to collect expert opinions on the value of mitigation, she is not an expert in the area herself. Tr. 105. She relied upon the FWS mitigation recommendations (purchase four acres of wild area, protect downstream wetland, prevent vehicular access, and prepare management plan), Tr. 105, but states that the FWS did not address mitigation for fracturing. Tr. 107-11. Yet, without expertise or expert advice in the area she produced a mitigation scheme that relied on brush piles under the bridge to address fracturing impacts. The Corps can cite no scientific evidence to support the effectiveness of this mitigation, and claims there is no "need [for] scientific evidence," yet uses it to support a finding of no significant impact. Tr. 112-13. Dr. Ohmart seriously questioned whether the outlined mitigation plans would be of any benefit, and knew of no evidence to support brush piles as effective mitigation. Tr. 209-20, 239-40.

Not only did the Corps fail to properly study the impacts of the Montaño Project as an isolated incident, they also failed to study the cumulative impacts of the

project with other past, present, and reasonably foreseeable actions. The Montaño Project would be only one of several fractures of the bosque in recent years. To scientifically gauge its impacts, the Corps must consider its impact both individually and cumulatively with other fractures. The CEQ regulations require this analysis in the NEPA threshold decision whether to prepare an EIS. 40 CFR § 1508.7, 1508.27(b)(7). *See Kleppe v. Sierra Club*, 427 US 390, 410 (1976); *Fritiofson*, 772 F2d at 1242-43.

The Corps, rather than directly and separately addressing the significance of the impacts and the public need analysis, inexplicably balances "impact" *against* "need." While appropriate in a public interest analysis, *see* 33 CFR § 320.4, this is incomprehensible in a significant impact analysis:

> In summary, the rating of cumulative impact of the 'fracturing' of the Rio Grande riparian bosque is difficult if not presently impossible to evaluate in the spectrum of insignificant to extremely significant impacts of total urban development and expansion. However, the present proposed action positively addresses several critical overall public interest needs which at this time cannot be reasonably foregone to eliminate only the bridge building segment of cumulative impact to the overall natural resource.

AR Vol. I-B, at 27 (EA). These simple assertions of insignificant impact do not even attempt to present some kind of reasoned analysis. Conclusory statements are completely contrary to the required analysis of significant impacts. The CEQ regulations anticipated this type of

rationalization by stating that an impact may be significant even if on balance the agency feels the project is beneficial. 40 CFR § 1508.27(b)(1).

This is a unique and precious natural resource, which "exceeds or equals the best wildlife habitat in North America." Tr. 216. The complete lack of credible study of the fracturing impacts to the bosque is perhaps the most serious and the most telling example of the lack of hard look by the Corps at the Montaño bosque. The Corps did not take a hard look at this and other impacts, it failed to consider important aspects of the problem, it offered explanations counter to the evidence, and its analysis is so implausible that it cannot be ascribed to a difference of view or the product of agency expertise. *See Motor Vehicle Manuf. Assoc. v. State Farm Mutual Ins. Co.*, 463 US 29, 42-44 (1983); 40 CFR § 1508.27(b)(1), (3), (4), (5).[18] It is this illegal review and decision that this Court can set right by granting this petition. More broadly, by reversing the decision below this Court can make clear that an agency ignores overwhelming scientific opinion at its peril and that reviewing courts must take great care to assure that the mandatory duty to evaluate possible significant impacts is not lost amid the desire to build even the best-intentioned of projects.

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[18] If this Court grants certiorari, the Village will also show how the Corps' study of wetlands, alternatives, *see* 33 CFR App. B.7, 40 CFR § 1502.14, historic properties impacts, and secondary and cumulative impacts, *see* 40 CFR § 1508.3 & 1508.8, were unreasoned, not supported by credible study, arbitrary, and capricious.

Subjects delegated to agency discretion are only exempt from judicial review when the agency's judgment is "fully informed and well-considered." *See e.g., People ex rel. Van de Kamp v. Marsh*, 687 FSupp 495, 498 (N.D. Cal. 1988); *Jones v. Gordon*, 792 F2d 821, 828 (9th Cir. 1986). Great deference, coupled with an ill-defined standard of review, leads to a complete lack of meaningful review. Unless the agency's expertise is brought to bear through independent verification, the agency's analysis of the applicant's proposal should not be entitled to much weight and deference. When an agency's analysis is so fundamentally flawed, it cannot be said whether significant impacts exist. In that event an EIS needs to be prepared.

## CONCLUSION

If the judiciary relegates NEPA review to unbridled agency discretion, meaningful review becomes impossible. If, on the other hand, the better reasoned approach utilized in some circuits is adopted, the courts will retain the authority to review *de novo* the ultimate conclusions of an agency. Different levels of deference should be applied as agency expertise and involvement increase. This case demonstrates the need for the courts to retain sufficient power of review to prevent "the spirit of the Act" from dying aborning because the agency's actions are "too well shielded from impartial review." This is a significant question as to the proper interpretation of a federal statute.

Therefore, because of the importance of the question, the need for uniformity of law in the circuits and to redress the miscarriage of justice that has occurred below, the Village respectfully asks that this Court grant certiorari to consider the proper standard of review and its application to the circumstances of this case.

Respectfully submitted,

WILLIAM G. WALKER
*Counsel of Record for Petitioners*

DOUGLAS L. HAYES
WALKER & VAN HEIJENOORT
150 Louisiana Blvd. NE
Albuquerque, NM 87108
(505) 268-4551

May, 1992

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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VILLAGE OF LOS RANCHOS DE ALBUQUERQUE; ANNE BULLOCK; STEVEN RUFFENNACH; EDWARD BANKS; BILL DERR; R.E. CLARK; ANN CLARK; CONRAD STACK; ARNOLD SARGEANT; KIT SARGEANT; RIO GRANDE VALLEY PRESERVATION SOCIETY,

Plaintiffs-Appellants,

v.

JOHN O. MARSH, Secretary of the Department of the Army; KENT R. GENSER, Colonel, District Engineer for the Albuquerque District of the Army Corps of Engineers; FRANK DUNKLE, Director of the United States Fish and Wildlife Service; MANUEL LUJAN, JR., Secretary of the Department of the Interior; HENRY J. HATCH, Lieutenant General; MICHAEL SPEAR, Region 2 (Southwest Region) of the Fish and Wildlife Service; CITY OF ALBUQUERQUE,

Defendants-Appellees.

No. 90-2012
No. 90-2026
No. 90-2052

(D.C.N.M. No. 88-1032-JC)

SUPPLEMENTAL EN BANC ORDER
ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Filed Feb. 11, 1992)

Before McKAY, Chief Judge, **ALDISERT,*** **HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY,** and **EBEL,** Circuit Judges.

EBEL, Circuit Judge.

The appellants have filed a Petition for Rehearing and Suggestion for Rehearing en Banc to reconsider the decision rendered in our unpublished Order and Judgment of October 24, 1991. In that Order, we applied an "arbitrary and capricious" standard to review an agency determination that a proposed project would not have an environmentally significant impact sufficient to require an Environmental Impact Statement ("EIS")[1] under the National Environmental Policy Act ("NEPA"), 42 U.S.C.

* The Honorable Ruggero J. Aldisert, Senior Circuit Judge for the Third Circuit, sitting by designation. Judge Aldisert participated in original panel's consideration of the petition for rehearing but did not participate in the rehearing en banc.

[1] 42 U.S.C. § 4332(2)(C)(i) requires that "all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action."

§ 4321 *et seq.* Order and Judgment at 4 (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 385 (1989)). In their petition for rehearing, the appellants point out that prior to the Supreme Court's decision in *Marsh*, the relevant standard of review in this Circuit was "reasonableness." *See Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir. 1988); *Park County Resource Council, Inc. v. United States Dep't of Agric.*, 817 F.2d 609, 621 & n.4 (10th Cir. 1987) (noting circuit split on appropriate standard of review); *City of Aurora v. Hunt*, 749 F.2d 1457, 1468 (10th Cir. 1984); *League of Women Voters v. United States Corps of Engineers*, 730 F.2d 579, 584-85 (10th Cir. 1984); *Brandon v. Pierce*, 725 F.2d 555, 563 (10th Cir. 1984); *Jette v. Bergland*, 579 F.2d 59, 64 (10th Cir. 1978); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1248-49 (10th Cir. 1973).[2]

The panel that rendered the decision denies the petition for rehearing.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court in regular active service. Based upon a poll of those judges, rehearing en banc was granted limited to the single issue of the appropriate standard for judicial review of an

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[2] A recent Tenth Circuit case, *Sierra Club v. Lujan*, 949 F.2d 362 (10th Cir. 1991), noted the apparent conflict between *Marsh* and Tenth Circuit precedent. *Id.* at 367-68. In *Lujan*, we held that under the particular facts of that case, the arbitrary and capricious standard of review controlled. *Id.* at 368.

agency's determination that a project does not have sufficient environmental impact to require an EIS.[3]

The court concludes that the appropriate standard for reviewing an agency's determination that a proposed project will not have environmental impact significant enough to require an EIS is the arbitrary and capricious standard of 5 U.S.C. § 706(2)(A).

The court summarizes the facts relevant to this issue as follows. The United States Army Corps of Engineers prepared an Environmental Assessment ("EA") of the effects of building the proposed Montano Bridge. Based on the EA, the Corps decided that the project would cause no significant environmental impact and therefore concluded that it need not prepare an EIS. The appellants brought suit, alleging among other things that the finding of no significant impact and the failure to prepare an EIS violated NEPA. The district court granted summary judgment to the appellees. In its Order and Judgment of October 24, 1991, this court affirmed the district court.

In *Marsh*, the Supreme Court addressed the "narrow question" of what standard the courts should use to review an agency's determination that an EIS need not be supplemented. *Marsh*, 490 U.S. at 375-76. The Court recognized that the circuits were split as to whether to apply

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[3] The en banc court has determined unanimously that additional oral argument and briefing would not materially assist its determination. Accordingly, the rehearing is ordered submitted without reargument or further briefing.

the arbitrary and capricious standard or the reasonableness standard and concluded that the arbitrary and capricious standard controlled. *Id.* at 375-77 & n.23. The Court characterized that case as

> a classic example of a factual dispute the resolution of which implicates substantial agency expertise. . . . The dispute . . . does not turn on the meaning of the term "significant" or on an application of this legal standard to settled facts. Rather, resolution of this dispute involves primarily issues of fact. Because analysis of the relevant documents "requires a high level of technical expertise," we must defer to the "informed discretion of the responsible federal agencies." . . . Accordingly, as long as the [agency's] decision not to supplement the [EIS] was not "arbitrary or capricious," it should not be set aside.

*Id.* at 376-77 (footnotes and citations omitted).

The initial decision that a project will not have significant impact and therefore will not require an EIS is no less a factual determination than the decision that new information is not significant and therefore will not require supplementing an existing EIS. *See id.* at 374 ("[T]he decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains 'major federal actio[n]' to occur, and if the new information is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.") (citation and footnote omitted). Therefore, the court views the Supreme Court's reasoning

as equally applicable to an agency's initial decision that a project will not have significant environmental impact.

Rather than create traps for the unwary by establishing different standards of review for similar agency actions, the court believes it preferable to use the arbitrary and capricious standard to review an agency's determination of the necessity of both an initial and a supplemental EIS, at least where the issue is whether the project will have significant environmental impact. *See Goos v. Interstate Commerce Comm'n*, 911 F.2d 1283, 1292 (8th Cir. 1990); *North Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1538 (11th Cir. 1990) (adopting "the arbitrary and capricious standard when reviewing agency action in NEPA cases").[4] To the extent that our prior cases held that a reasonableness standard of review should be used, *see Hodel*, 848 F.2d at 1089; *Park County Resource Council, Inc.*, 817 F.2d at 621 & n.4; *Hunt*, 749 F.2d at 1468; *League of Women Voters*, 730 F.2d at 584-85; *Brandon*, 725 F.2d at 563; *Jette*, 579 F.2d at 64; *Butz*, 484 F.2d at 1248-49, they are inconsistent with *Marsh*, 490 U.S. at 375-77, and we now

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[4] The Eighth Circuit held in *Goos* that the arbitrary and capricious standard governs review of whether significant impact existed to require an EIS. The court held, however, that the reasonableness standard would continue to control review of the "threshold issue" of whether the project involved "major federal action" sufficient to implicate NEPA. *Goos*, 911 F.2d at 1292. In our own circuit, courts used, prior to *Marsh*, the reasonableness standard to review an agency's determination that no "major federal action" was involved. *See Hodel*, 848 F.2d at 1089. On appeal, the parties do not raise the issue whether the Montano Bridge Roadway project involves major federal action; therefore, we do not address whether *Marsh* alters the standard of review of that agency determination.

overrule such holdings. As the Supreme Court observed in *Marsh*, "the difference between the 'arbitrary and capricious' and 'reasonableness' standards is not of great pragmatic consequence"; therefore, changing to the former "will not require a substantial reworking of long-established NEPA law." *Marsh*, 490 U.S. at 377-78 n.23.

Because the court concludes that the prior Order and Judgment in this case applied the correct standard of review, the court AFFIRMS the prior judgment in that regard, which is the only issue considered in this rehearing en banc.

It is so ORDERED.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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VILLAGE OF LOS RANCHOS DE ALBUQUERQUE; ANNE BULLOCK; STEVEN RUFFENNACH; EDWARD BANKS; BILL DERR; R.E. CLARK; ANN CLARK; CONRAD STACK; ARNOLD SARGEANT; KIT SARGEANT; RIO GRANDE VALLEY PRESERVATION SOCIETY,

Plaintiffs-Appellants,

v.

JOHN O. MARSH, Secretary of the Department of the Army; KENT R. GENSER, Colonel, District Engineer for the Albuquerque District of the Army Corps of Engineers; FRANK DUNKLE, Director of the United States Fish and Wildlife Service; MANUEL LUJAN, JR., Secretary of the Department of the Interior; HENRY J. HATCH, Lieutenant General; MICHAEL SPEAR, Region 2 (Southwest Region) of the Fish and Wildlife Service; CITY OF ALBUQUERQUE,

Defendants-Appellees.

No. 90-2012
No. 90-2026
No. 90-2052

(D.C. No. 88-1032-JC)
(Dist. New Mexico)

## ORDER AND JUDGMENT*

(Filed Oct. 24, 1991)

Before HOLLOWAY, ALDISERT,** and EBEL, Circuit Judges.

### BACKGROUND

This is an appeal from the district court's order granting summary judgment to appellees. A more complete recitation of the facts surrounding this controversy appear in *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1478-79 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991). Therefore, for the sake of brevity, we summarize the facts surrounding this particular appeal.

In the lower court, appellants sought declaratory and injunctive relief in order to challenge the United States Army Corps of Engineers ("the Corps") decision to issue a permit that would allow the proposed Montano Bridge to be built over the Rio Grande River. Appellants asserted in the lower court that the granting of the permit pursuant to 33 U.S.C. § 1344 (§ 404 of the Clean Water Act) for a fill of the waters of the United States in conjunction with the Montano Bridge violated various federal laws

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** The Hon. Ruggero J. Aldisert, Senior Circuit Judge for the Third Circuit, sitting by designation.

and regulations, including the National Environmental Policy Act ("NEPA").

Specifically, the district court summarized the appellants' contentions as follows:

1. That the defendants violated NEPA by failing to prepare an Environmental Impact Statement and by finding that the Montano project would not have significant environmental impact, and by failing to fully address the impacts of the corridor associated with the project;

2. That the district engineer of the Corps violated EPA guidelines by granting a § 404 permit to the City despite the existence of alternatives to the bridge which would have a less adverse impact on the Rio Grande Bosque area;

3. That the Corps violated § 404 of the Clean Water Act by failing to designate the Bosque habitat in and adjacent to the Montano corridor as wetlands. In addition, the Corps failed to meet its obligation under the Clean Water Act to make a reasoned wetlands determination based on the fact that it did not gather sufficient information;

4. That in failing to find that practical alternatives with less adverse impact on the Bosque existed, and in finding that the granting of the § 404 permit was contrary to the public interest, the district engineer's decision was arbitrary, capricious and an abuse of discretion which is unlawful and should be set aside pursuant to the Administrative Procedure Act;

5. That the Fish and Wildlife Service failed to fulfill its responsibility by failing to recommend the no project alternative when mitigation could not be accomplished, or to recommend that the bridge be placed in a less-environmentally damaging site.

Dist. Ct. Opin. at 2.

Appellees asserted that the plaintiffs had not "made a *prima facie* showing sufficient to warrant continued litigation on this matter, since they ha[d] not presented evidence that the administrative agency acted in an arbitrary, capricious or otherwise unlawful manner." *Id.* at 3. The district court, citing *Sabin v. Butz*, 515 F.2d 1061, 1067 (10th Cir. 1975), ruled in favor of the defendants, and granted their request for summary judgment. Dist. Ct. Opin. at 5. The court found that the issue before it was not "whether the plaintiffs can point to one or other conflicting fact or opinion in the record. . . . Instead, the issue before the Court is whether the record before the administrative agency substantiate[d] that agency's finding." *Id.* at 3-4.

## ANALYSIS

### I. No Error In Granting Of Summary Judgment

The first issue that appellants raise is whether

> [t]he granting of federal defendants' motion for summary judgment was erroneous because genuine issues as to material facts exist regarding whether the Finding of No Significant Impact by the Corps [of Engineers] was justified by the Environmental Assessment as required by § 404 of the Clean Water Act, 33 U.S.C. § 1344, and

> NEPA, 42 U.S.C. § 4332, *et seq.*, and applicable regulations.

Appellants' Br. at 9.

The mere existence of genuine issues of material fact in the record before the Corps would not, in this case, preclude a granting of summary judgment in the district court in favor of the defendants. The district court, as a reviewing court, need only decide if there is a material dispute about whether the agency at issue acted in an "arbitrary or capricious" manner. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 385 (1989). We agree with the appellees that "[t]his standard of review is highly deferential." *Friends of the Earth v. Hintz*, 800 F.2d 822, 831 (9th Cir. 1986). Indeed, the Supreme Court has stated that

> in making the factual inquiry concerning whether an agency decision was "arbitrary or capricious," the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." This inquiry must "be searching and careful," but "the ultimate standard of review is a narrow one." When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.

*Marsh*, 490 U.S. at 378 (citation omitted).

The district court's "Memorandum Opinion and Order," dated November 30, 1989, and its "Memorandum Opinion and Findings of the Court on Plaintiffs' Motion

for Preliminary Injunction" ("Dist. Ct. Findings"), filed May 26, 1989, demonstrate that it focused on the administrative record. Indeed, the district court cited to ample evidence to support the conclusion that the agency actions were not conducted in an arbitrary or capricious manner. Clearly, there are disputes about, for instance, the ultimate impact of fracturing the bosque, the potential for secondary impacts arising from the project, and the availability of alternative forms that the project could take. However, we agree with the district court that there was ample evidence to affirm the agency's finding of no significant impact for purposes of NEPA under the "arbitrary or capricious" standard of review. We review the different areas of dispute.

A. The Bosque and Wetlands Issues:

The district court found that the environmental assessment and administrative record disclosed that the preservation of the bosque and potential adverse effects were discussed at length. We agree and have reviewed this record. *See* Environmental Assessment ("EA") at 10-13, 24-27, 35, 46-47; Administrative Record ("AR") Vol. III at 270-271, 288-89, 320-21, 326-27. We do not agree with appellants' assertion that "The Record is Inadequate to Support the Corps' 'No Wetlands' Finding" concerning the Bosque. Appellants' Br. at 37. We have examined the evidence on this issue, and find it adequate to support the agency's finding. Indeed, the district court paid particular attention to this determination by the Corps, and we agree that the agency had the benefit of ample studies and reports on the topic. See Dist. Ct. Findings at 31-32.

B. Secondary and Cumulative Impacts:

On the issue of secondary and cumulative impacts, we agree with the appellants that projects may have "synergistic effects which make[] their cumulative impacts relevant to the significant impacts determination." Appellants' Br. at 16-17 (footnote omitted). This alone, however, does not mean that the agency was arbitrary or capricious in finding that the secondary and cumulative impacts did not create a significant impact under NEPA. There is ample evidence on the record, recited by the district court, *see* Dist. Ct. Findings at 13-16, which we have reviewed, to demonstrate that effects on noise level, air quality, and traffic and other potential impacts were all adequately considered. *See* EA at 15-16, 21, 24; AR Vol. IV at 443; Vol. VI at 834-45.

C. Alternatives:

We agree with appellees that the "district court's extensive discussion of the Corps' consideration of alternatives is thorough and well-reasoned." Appellees' Br. at 30. We have reviewed the evidence upon which the district court relied, and agree that "[a]lthough this Court feels that alternatives for accomplishing the overall goal probably exist, the Court's role is only to assure that the Corps properly studied plausible alternatives." Dist. Ct. Findings at 24. Alternatives are always possible, and we believe that the agency properly considered and weighed such contingencies. *See* EA at 2-5, 44; Dist. Ct. Findings at 20-25.

This evidence is more than enough to support an affirmation of the district court's granting of summary

judgment. Although parties will always disagree over agency determinations, "[t]he question[s] presented for review in this case [are] classic example[s] of a factual dispute the resolution of which implicates substantial agency expertise." *Marsh*, 490 U.S. at 376. Thus, we have approached the review under the deferential standard of whether the actions were arbitrary or capricious, and affirm the district court's granting of summary judgment.

II. No Error In Court's Refusal To Consider New Evidence

The appellants' second and fourth issues essentially allege that the district court limited the range of evidence it would hear and refused to consider new evidence that was placed before it on the motion for summary judgment. In particular, this evidence related to issues of public nuisance such as noise and population levels and the fracturing of the Bosque.

We agree with the appellees that "the district court properly heeded the general rule that judicial review of agency action is limited to review of the administrative record." Appellees' Br. at 34. The Supreme Court has stated in no uncertain terms that

> ordinarily review of administrative decisions is to be confined to "consideration of the decision of the agency . . . and of the evidence on which it was based." "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."

*Florida Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (citations omitted). There are sound reasons why some technical questions are delegated to the agency inquiry and decision process, with courts playing a role of review. In this case, the agency was the appropriate place to litigate this matter, and the district court did not err by limiting the evidence it heard and thereby preventing the appellants from possibly relitigating the case in its forum. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553-54 (1978).

Notwithstanding its own holding limiting the evidence, the district court took into account the new evidence and found that "[e]ven if the Court were to consider the 'nuisance' evidence, it does not establish that the federal defendants acted arbitrarily or capriciously." Dist. Ct. Opin. at 5. On appeal, we have reviewed this new evidence and agree with the conclusion of the lower court. Thus, we affirm on this alternative ground.

III. Irreparable Harm Is Not Equal To Significant Impact

In its ruling, the district court stated "that the 'fracturing' of the Bosque will cause irreparable and irretrievable injury to the Bosque itself." *Id.* Appellants seize upon this statement to argue that "[h]aving found irreparable and irretrievable harm to the Bosque, the Court was required to remand for appropriate evaluation by the Corps." Appellants' Br. at 45. We disagree with this contention, and note that the district court also stated "that the Corps of Engineers properly put these considerations

through its own balancing test, and determined that on balance the Montano Bridge site was the most appropriate for accomplishing the applicants' purposes." Dist. Ct. Opin. at 5.

We simply cannot agree with the appellants' contention that, in essence, the district court's statement concerning irreparable injury mandated a remand on the issue of whether there was a significant impact under NEPA. Whenever there is an undertaking of the magnitude of the Montano Bridge project, there may be some irreparable injury inflicted upon the surrounding area. All parties, including the district court, appear to agree on that proposition. However, it does not follow that therefore there is a significant impact as that term is meant under NEPA. Thus, we find no error in the fact that the district court did not remand the case after stating that irreparable injury would occur to the Bosque because some of it would be lost during the project.

## IV. No Error Concerning Fish And Wildlife Service Actions

We disagree with the appellants that the "Fish and Wildlife Service ["FWS"] . . . has failed to fulfill its responsibilities under the Fish and Wildlife Coordination Act," Appellants' Br. at 48, by failing to recommend that the project not proceed, and that therefore the Fish and Wildlife Service somehow acted arbitrarily or capriciously. We first note that it is uncontested by the appellants that "the Corps adopted all of the FWS recommendations," and that they "were incorporated

into the permit as Special Conditions." Appellees' Br. at 41; *see also* Dist. Ct. Findings at 32-33.

Additionally, we agree with appellees that "[t]his case is an example of the benefits of the process," to the extent that the Corps appears to have worked with the Fish and Wildlife Service and given its suggestion serious consideration. *See* EA 27-28; AR Vol. I Tab A at 4; Fish and Wildlife Service AR Supplemental Vol. IV at 10, 12-14, 21. The FWS did not violate any of its legal obligations in failing to recommend a "no project" alternative in this case and what input that FWS did offer was adequately considered by the Corps.

It would unduly prolong this Order were we to address each other dispute raised by appellants. Suffice it to say that we have carefully reviewed the record and in all regards complained of by appellants we have concluded that the district court order should be AFFIRMED.

Entered for the Court:

David M. Ebel
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

VILLAGE OF LOS RANCHOS
DE ALBUQUERQUE, et al.,

Plaintiffs,

v. No. CIV 88-1032 JC

LIEUTENANT GENERAL HENRY
J. HATCH, et al.,

Defendants.

FINAL JUDGMENT

(Filed Feb. 28, 1990)

PURSUANT TO the Memorandum Opinion and Order entered in this matter on November 30, 1989, IT IS ORDERED, ADJUDGED AND DECREED that final judgment be, and the same hereby is, entered for the defendants in this matter and the relief requested by the plaintiffs is denied.

/s/ John E. Conway
UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

/s/ John W. Zavitz
JOHN W. ZAVITZ
Assistant U.S. Attorney
For Defendants

APPROVED AS TO FORM:

/s/ William G. Walker
WILLIAM G. WALKER
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

VILLAGE OF LOS RANCHOS
DE ALBUQUERQUE, et al.,

Plaintiff,

vs.

No. CIV 88-1032 JC
ENTERED: 11-30-89

LIEUTENANT GENERAL
HENRY J. HATCH, et al.,

Defendants.

## MEMORANDUM OPINION AND ORDER

(Filed Nov. 30, 1989)

THIS MATTER is now before the Court on the federal defendants' Motion for Summary Judgment, filed May 2, 1989. Having reviewed the memoranda of the parties, heard evidence presented at the preliminary injunction hearing, heard the arguments of counsel, and reviewed the applicable law, this Court finds that the motion is well-taken and will be granted.

This case involves a challenge to the decision of the United States Army Corps of Engineers to issue a permit, pursuant to 33 U.S.C. § 1344 (§ 404 of the Clean Water Act) for a fill of the waters of the United States in conjunction with the construction of the proposed Montaño Bridge across the Rio Grande River. The applicant for the permit is the City of Albuquerque. Early on in this case, the plaintiffs moved for a preliminary injunction to halt further progress on the construction of the bridge. The

motion was denied. The plaintiffs' grounds for the preliminary injunction then, as now, are set forth in the Initial Pre-Trial Report filed on May 31, 1989.

At page 2, paragraphs 1-5, the plaintiffs' contentions are summarized as follows:

1. That the defendants violated NEPA by failing to prepare an Environmental Impact Statement and by finding that the Montaño project would not have significant environmental impact, and by failing to fully address the impacts of the corridor associated with the project;

2. That the district engineer of the Corps violated EPA guidelines by granting a § 404 permit to the City despite the existence of alternatives to the bridge which would have a less adverse impact on the Rio Grande Bosque area;

3. That the Corps violated § 404 of the Clean Water Act by failing to designate the Bosque habitat in and adjacent to the Montaño corridor as wetlands. In addition, the Corps failed to meet its obligation under the Clean Water Act to make a reasoned wetlands determination based on the fact that it did not gather sufficient information;

4. That in failing to find that practical alternatives with less adverse impact on the Bosque existed, and in finding that the granting of the § 404 permit was contrary to the public interest, the district engineer's decision was arbitrary, capricious and an abuse of discretion which is unlawful and should be set

aside pursuant to the Administrative Procedure Act;

5. That the Fish and Wildlife Service failed to fulfill its responsibility by failing to recommend the no project alternative when mitigation could not be accomplished, or to recommend that the bridge be placed in a less-environmentally damaging site.

All of these contentions were argued at the preliminary injunction hearing conducted by the Court from May 15 through May 17, 1989. At that time, counsel for both parties had the opportunity to present additional evidence, and to reargue evidence contained within the Administrative Record. After having heard three days of argument, this Court again reviewed the memoranda submitted by the parties and the entire Administrative Record for purposes of determining whether a preliminary injunction should issue. This Court ultimately determined that the Motion for Preliminary Injunction should be denied, and on May 26, 1989 issued a thirty-nine page opinion detailing its findings and conclusions.

Since the issuance of that opinion, the parties have not come forward with any material, relevant to the current motion, which has not been previously presented to the Court. In ruling on the Motion for Preliminary Injunction, the Court found that the plaintiff had not established a substantial likelihood of prevailing on the merits of their case in that they were unable to establish that the Corps had undertaken the decision not to require an EIS for an arbitrary, capricious or otherwise illegal purpose. This Court found that the review of the Montaño project

conducted by the Corps of Engineers addressed each of the concerns raised by the plaintiffs.

The federal defendants now request that this Court rule that the plaintiffs have not made a **prima facie** showing sufficient to warrant continued litigation of this matter, since they have not presented evidence that the administrative agency acted in an arbitrary, capricious or otherwise unlawful manner. The issue before this Court is not whether the plaintiffs can point to one or other conflicting fact or opinion in the record. As the federal defendants have pointed out, the record in these types of proceedings will always contain contradictory opinions. Instead, the issue before the Court is whether the record before the administrative agency substantiates that agency's findings. **Sabin v. Butz**, 515 F.2d 1067 (10th Cir. 1975).

Before any administrative action can be set aside, the challenging party must prove that the action is unreasoning, without consideration, and in disregard of the facts and circumstances of the case. **Coleman v. Darden**, 595 F.2d 533, 539 (10th Cir. 1970). Rather than restate all of the Court's findings in this opinion, the Court will incorporate by reference its findings as found in the May 26, 1989 Memorandum Opinion. As outlined therein the plaintiffs have not provided sufficient evidence or otherwise shown how the Corps of Engineers failed to comply with NEPA's procedural requirements or failed to undertake a good faith, objective effort to comply with those requirements. The plaintiffs have failed to show that the record is insufficient as a basis for the Corps of Engineers' conclusions.

The plaintiffs have proferred new evidence relating to the "public nuisance" issue, which they apparently now seek to have admitted in this proceeding. This evidence has not been considered in conjunction with the current motion. Such consideration would violate the Court's earlier order which stated that the only extra-record evidence which would be admitted was that which concerned the effects of "fracturing" on the Bosque. The new evidence on the "public nuisance" issue has been improperly submitted by the plaintiffs. In this review of an agency action based on the Administrative Record, it is inappropriate for the plaintiffs to seek to admit evidence outside of the Administrative Record in an effort to relitigate their case at the district court level. **Florida Power & Light Co. v. Lorion**, 470 U.S. 729 (1985); **Federal Power Comm'n v. Transcontinental Gas Pipeline Corp.**, 423 U.S. 326, 331 (1976).

Even if the Court were to consider the "nuisance" evidence, it does not establish that the federal defendants acted arbitrarily or capriciously. This Court has already recognized that the "fracturing" of the Bosque will cause irreparable and irretrievable injury to the Bosque itself, but the Court has also found that the Corps of Engineers properly put these considerations through its own balancing test, and determined that on balance the Montaño Bridge site was the most appropriate for accomplishing the applicants' purposes.

Therefore, based on the Court's previous findings in this matter, and based on the fact that the plaintiffs have not come forth with any new evidence, this Court finds that the federal defendants are entitled to judgment as a matter of law, and that there are no genuine issues as to

relevant material facts. Summary judgment is appropriate in accordance with Rule 56 of the Federal Rules of Civil Procedure, and will be entered on behalf of the defendants.

Wherefore,

**IT IS ORDERED, ADJUDGED AND DECREED** that the defendants' Motion for Summary Judgment be, and the same hereby is, **granted.**

DATED this 30th day of November, 1989.

/s/ John E. Conway
UNITED STATES DISTRICT JUDGE

Attorneys:

For Plaintiffs: William G. Walker, Esq.
Thomas L. Popejoy, Esq.

For Defendants: Donald A. Carr. Esq.
Roger J. Marzulla, Esq.
Kaye A. Allison, Esq.
John Zavitz, Esq.
Susan K. Ehlen, Esq.
Pauline Milius, Esq.
Darrell R. Rickenberg

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
HONR. JOHN E. CONWAY, JUDGE PRESIDING

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|---|---|---|
| VILLAGE OF LOS RANCHOS de ALBUQUERQUE, et al., Plaintiffs, | ) | |
| vs. | ) | No. CIV 88-1032 JC |
| E. R. HEIBERT, et al., Defendants. | ) | |

REPORTER'S TRANSCRIPT OF PROCEEDINGS

May 16, 1989

Barbara K. Harris
Official Court Reporter
(505) 842-9494

* * *

[p. 328] THE COURT: All right, the question before me today that I am tc decide is whether or not to accept the testimony and find that the representation is sufficient that I should accept that testimony.

In Friends of the Earth v. Hense, they state at page 828, with few exceptions, discussed below, judicial review of an agency record is limited to a review of the administrative record.

And then they go on to say at 829, but exceptions exist to the rule that review is limited to the administrative record. A court may consider evidence outside the administrative record is necessary to explain agency action.

When there is such a failure to explain administrative action as to frustrate effective judicial review the court may obtain from the agency, either through affidavits or testimony, such additional explanations of the reasons for the agency decision as may prove necessary.

The purpose of the court's inquiry should be to ascertain whether the agency considered all relevant factors or fully exculpated its course of conduct or grounds of decision. They go on to state that the administrative record was sufficient.

In County of Suffolk they state, at page 1384, that generally, however, the allegations that an EIS has neglected to mention a serious environmental consequence, failed [p. 329] adequately to discuss some reasonable alternative, or otherwise stubborn problems or serious criticism under the road, raise issues sufficiently important to permit the introduction of new evidence in the district court, including expert testimony with respect to technical matters, both in challenges to the sufficiency of an environmental impact statement and in suits attacking an agency determination that no such statement was necessary.

The evidence introduced for the first time in the district court, however, would be probative only in so far as it attempted to show either that the agency's research or analysis was clearly inadequate or that the agency improperly failed to set forth an opposing view, widely shared in the relevant scientific community.

I am not satisfied that the agency record is sufficient. I think that there is – the plaintiffs have carried their burden on showing that I should go outside the record

and consider the testimony of the doctor that testified yesterday.

I do not see that I need to remand this back to the Corps at this time. I think this is a matter of proof at the time of the trial of this matter as to the sufficiency of what they have done.

The government did not provide me a great deal of information yesterday and I gave them the opportunity to [p. 330] present additional witnesses, which they failed to do. And so I will consider the testimony that I heard yesterday for the purposes of the motion today on the preliminary injunction.

* * *

[p. 334] THE COURT: One thing I failed to mention, is that the testimony about Dr. Ohmart's opinion as to wetness will not be considered by me.

* * *

[p.493] THE COURT: Thank you, sir. You may step down.

MS. HECTOR: I have one more matter that I ask the court to take judicial notice of. This is the legislation that was passed in the last legislature of the State of New Mexico, which prohibits the use of taxpayer money on any properties, historic properties, unless there is no reasonable alternative, and this is part of our argument related to the public interests and the law related to the public interests on whether or not, if the legislatures have spoken on what is the public interests.

That's all we have, your Honor, on the preliminary injunction. The only thing I would move at this time, but perhaps it's best to wait until the end, is that we believe that the testimony – we believe that the court should reconsider the question of whether or not it should take additional testimony on the noise impacts and the impacts to historic preservation, and the impact to Dietz Farms, because we believe that there is ample evidence to support the same standard from the county of sufficient objection to show the Court that there are significant impacts which were not taken into account, and in that case not addressed at all, I mean not even mentioned, and that the administrative record cannot possibly tell the Court what those impacts are.

THE COURT: That will be denied. Are you ready to proceed?

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF NEW MEXICO

VILLAGE OF LOS RANCHOS DE ALBUQUERQUE, et al.,

Plaintiffs,

vs.

No. CIV 88-1032 JC

LIEUTENANT GENERAL HENRY J. HATCH, CHIEF OF ENGINEERS OF THE CORPS OF ENGINEERS, et al.,

ENTERED: 5-26-89

Defendants.

**MEMORANDUM OPINION AND FINDINGS OF THE COURT ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

(Filed May 26, 1989)

This case involves a challenge to the decision of the United States Army Corps of Engineers, henceforth the "Corps" to issue a permit, pursuant to 33 U.S.C. § 1344 (Sec. 404 of the Clean Water Act) for a fill of the waters of the United States in conjunction with the construction of a bridge across the Rio Grande River. The applicant for the permit is the City of Albuquerque, and the proposed bridge site is variously known as the "Montaño Site," the "Montaño Project" and/or the "Preferred Alternative Site."

The plaintiffs have moved for a preliminary injunction which would halt further progress on the construction of the bridge pending a trial on the merits. For the benefit of a complete record, the Court will briefly outline the procedural history of this case.

At various times from 1965 through the present, the need for additional river crossings, connecting eastern and western portions of the City of Albuquerque, has been discussed and agreed upon by various elected officials and the Middle Rio Grande Council of Governments ("MRGCOG"). A study by the Urban Transportation Planning Policy Board of the MRGCOG reviewed a number of alternative sites for the location of the additional river crossings, and in 1979 determined that the "preferred alternative" included construction of a four-lane bridge at the El Pueblo site, also known as the Paseo del Norte site, and a two-lane crossing at Montaño Road between Rio Grande and Coors Boulevards. The preferred alternative, and others, were the subject of a Draft Environmental Impact Statement prepared in 1980, AR Vol. XII, and a Final Environmental Impact Statement ("FEIS") prepared in 1983, AR Vol. XI. Both statements were prepared by the Federal Highway Administration ("FHWA") in conjunction with the New Mexico State Highway Department.

In 1983 Albuquerque voters approved a general obligation bond of $4,200,000 for general road improvements. AR Vol. III, Tab B. Two years later the voters approved a general obligation bond allocation of $6,100,000, also for general improvements. The City earmarked these funds for construction of the Montaño Bridge.

Just prior to the vote on the second bond appropriation, and following the issuance of the Record of Decision by the Corps, in January of 1984, the City of Albuquerque announced its intention to proceed with the Montaño Project. On August 30, 1984 the Village of Los Ranchos de

Albuquerque, the Rio Grande Valley Preservation Society, and a number of individuals filed suit in federal court alleging, **inter alia,** that the FEIS had failed to analyze the environmental impacts of the Montaño Project and failed to do a comparative analysis of the project and other reasonable alternatives. This suit is styled **Village of Los Ranchos de Albuquerque v. Barnhart, et al.,** No. CIV 84-1273 JB, and is currently pending on appeal to the Tenth Circuit.

In April of 1986, the City applied to the Corps for a permit pursuant to the requirements of § 404 of the Clean Water Act, 33 U.S.C. § 1344. The permit is necessary because the City's plan for construction of the Montaño Bridge includes the temporary placement of fill materials in the navigable waters of the United States. Following publication, solicitation of public comments, public hearing, and considerations of the documents and comments received, the permit, with thirteen special conditions, was issued on July 6, 1987 by the district engineer, Lt. Col. David E. Peixotto. Throughout the comment period, the plaintiffs repeatedly requested that the Corps take the position that the FEIS developed by the FHWA was inadequate and additionally requested that a new or supplemental EIS be prepared to assist the Corps in making a proper public interest determination and decision on the permit application.

The Corps opted not to do a supplemental EIS. Instead, pursuant to its responsibility to determine whether a major federal action "significantly affect[s] the quality of the human environment," the Corps made a "finding of no significant impact, ("FONSI") supported

by an environmental assessment ("EA"). This lawsuit ensued.

On August 29, 1988 plaintiffs filed this claim challenging the permit, and on March 6, 1989 filed the Motion for Preliminary Injunction that is the subject of these findings.

The Tenth Circuit has established the standards that a movant must meet in support of its application for preliminary injunction. They are as follows:

1. The movant must show a substantial likelihood that it will eventually prevail on the merits;

2. The movant must show that it will suffer irreparable injury unless the injunction issues;

3. The movant must show that the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; and

4. The movant must show that the injunction, if issued, would not be adverse to the public interest.

**Lundgrin v. Claytor,** 619 F.2d 61 (10th Cir. 1980) and **Otero Savings and Loan Ass'n. v. Federal Reserve Bank**, 665 F.2d 275 (10th Cir. 1981). Furthermore, the Tenth Circuit has made it clear that the "primary function of a preliminary injunction is to preserve the **status quo** pending a final determination of the parties' rights." **Penn v. San Juan Hospital, Inc.,** 528 F.2d 1181, 1185 (10th Cir. 1975), **Otero Savings and Loan Ass'n., supra** at 277. In its opinion in the **Otero Savings** case, the Court also stated

that, as to the first part of the test regarding substantial likelihood of success on the merits, "it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." **Supra** at 278. This Court will address the four-part test in the order established by the Tenth Circuit.

## PART I

The plaintiffs' claims against the Corps are lengthy and will therefore be set out here for organizational purposes:

**Claim No. 1:**

That the Environmental Assessment done by the Corps and relied on to establish the FONSI is unreasonable in that the impacts of the Montaño Project have not been adequately analyzed or disclosed for the decision-makers or the public.

**Claim No. 2:**

That the EA is inadequate in that it fails to do a sufficient comparison of alternatives to the Montaño Project.

**Claim No. 3:**

That the Corps improperly segmented the Montaño Crossing Project as it relates to the bridge, from the Montaño Corridor Project which involves the widening and other improvements to Montaño Boulevard, thereby utilizing an invalid basis for their study.

**Claim No. 4:**

That the EA is inadequate because the Corps failed to designate the area of the Bosque affected by the Montaño Project as "wetlands."

**Claim No. 5:**

That the § 404 permit is invalid because the Fish and Wildlife Service of the Department of the Interior has failed to fulfill its responsibilities under the Fish and Wildlife Coordination Act ("FWCA").

**Claim No. 6:**

That the decision of the Corps to issue the permit was arbitrary and capricious.

**Analysis of Claim No. 1**

The plaintiffs' first claim is a broad allegation which actually encompasses several separate sub-parts. The Court will treat those sub-parts in the order they are presented. First, however, the Court will set out the appropriate standard of review of actions alleging agency non-compliance with NEPA guidelines.

The United States Supreme Court, as recently as May 1, 1989, indicated that the "arbitrary and capricious" test found at § 10e of the Administrative Procedures Act ("APA"), 5 U.S.C. § 706, was the appropriate standard for review of agency determinations not to supplement an EIS. **Marsh v. Oregon Natural Resources Council**, No. 87-1703, 57 U.S.L.W. 4504 (May 2, 1989). The Tenth Circuit has held that the standard for review of NEPA claims generally is the "reasonableness" test. **Park County Resource Council v. Dept. of Agriculture**, 817 F.2d 609,

621 (10th Cir. 1987). As the Supreme Court noted, "the difference between the 'arbitrary and capricious' and 'reasonableness' standards is not of pragmatic consequence." **Marsh, supra** at n. 23. An act which is reasonable is neither arbitrary nor capricious, just as an unreasonable decision is either arbitrary or capricious. The essence of the rulings under either standard is to assure that, in conducting its investigations or decision-making processes, the agency in question makes a reasoned decision based on an evaluation of the relevant factors. The Tenth Circuit recognized this in **Park County** when they stated that "NEPA was designed to insure a fully informed and well considered decision." 817 F.2d at 621, quoting **Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.** 435 U.S. 519, 558 (1978).

Furthermore, the standard of review of agency action is highly deferential toward the agency. While the Court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment," and while "this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." **Friends of the Earth v. Hintz,** 800 F.2d 822 (9th Cir. 1986) quoting **Citizens to Preserve Overton Park, Inc. v. Volpe,** 401 U.S. 402, 416 (1971). Accord, **Wyoming Outdoor Coordinating Council v. Butz,** 484 F.2d 1244 (10th Cir. 1973). Finally, the United States Supreme Court has noted that when reviewing the decision of a federal agency not to prepare an EIS, a court shall not "interject itself within the area of discretion . . . as to the choice of action to be taken." **Strycker's Bay Neighborhood Council v. Karlen,** 444

U.S. 223, 227-28 (1980). Once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences. **Id.**

The plaintiffs' first allegation under Claim No. 1 is that the Corps erred in issuing the FONSI because the environmental assessment failed to "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement. . . . " 40 C.F.R. § 1508.9(a)(1).

NEPA requires that all federal agencies shall:

> include in every recommendation or report on proposals for legislation and other Federal Actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on (i) the environmental impact of the proposed action, (ii) any adverse environmental effect which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

In the event that an agency makes a finding of no significant impact, as the Corps has done here, the FONSI must be supported with an environmental assessment (EA). The EA must include a comprehensive assessment of the expected effects of a proposed action, **Foundation on Economic Trends v. Weinberger**, 610 F. Supp. 829, 837

(D.D.C. 1985), and "mere perfunctory language or conclusory language will not be deemed to constitute an adequate record and cannot serve to support the agency's decision not to prepare an EIS." **Citizen Advocates for Responsible Expansion v. Dole**, 770 F.2d 423, 434 (5th Cir. 1985). As noted above, it is the task of the reviewing court to determine whether "the agency decision not to develop an impact statement is reasonable and made objectively and in good faith on a reviewable environmental record." **Save Our Wetlands, Inc. v. Sands**, 711 F.2d 634, 644 (5th Cir. 1983).

Plaintiffs urge that with respect to the decision not to prepare an EIS, the Court must determine "whether the plaintiff has alleged facts which, if true, show that the recommended project would materially degrade any aspect of environmental quality. If the Court finds that the project may cause a significant degradation of some human environmental factor, the Court should require the filing of an impact statement." **Save Our Ten Acres v. Kreger**, 472 F.2d 463, 466-67 (5th Cir. 1973). This Court is not persuaded by the rationale that every finding of significant degradation of some human environmental factor automatically calls for an EIS. Instead, this Court holds that there are some instances where degradations to the environment can be, and are, adequately studied in an environmental assessment. Rather than automatically remand to the agency involved whenever significant environmental degradation is at issue, this Court determines its duty to be a review of the agency decision to determine whether the Corps has taken a "hard look" at the environmental consequences. **Kleppe v. Sierra Club**, 427 U.S. 390, 410, n. 21 (1976). Determining whether the

agency has taken a "hard look" at the environmental factors will involve different considerations for each case, but under Tenth Circuit law, the agency's determination will be valid if the agency made a "good faith, objective effort" to comply with NEPA's procedural requirement. **Jette v. Bergland,** 579 F.2d 59 (10th Cir. 1978); **National Helium Corp. v. Morton,** 486 F.2d 995 (10th Cir. 1973); **Manygoats v. Kleppe,** 558 F.2d 556, 560 (10th Cir. 1977).

Therefore, the Court can find, as it does here, that some environmental degradation affecting the human environment will undoubtedly occur if the Montaño Bridge is built, without being forced to find that an EIS is automatically required.

Therefore, the question before the Court with respect to this issue of the adequacy of the EA is two-part. First, whether the Corps took a "hard look" at the environmental consequences in a good faith, objective effort to comply with the requirements of NEPA. Second, whether the Corps' decision is adequately supported by the record.

**a. Effects of the Bridge Construction on the Bosque.**

Plaintiffs assert that the Corps inadequately assessed and analyzed the effects of bridge construction on vegetation, the cottonwood forest and wildlife species which make up the Bosque.[1] This Court is not persuaded that the Corps failed to meet its burden. The parties agree that the construction of the bridge will involve the destruction

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[1] "Bosque" is the Spanish word for forest.

of approximately four acres of Bosque, and will split the Bosque into two roughly equal parts, approximately 400 and 455 acres respectively. In its analysis, the Corps has made consistent references to the effects of the construction and has included several special conditions to mitigate those effects. A review of the EA and administrative record shows that the Bosque was discussed in various contexts and that virtually all impacts on wildlife and vegetation were considered. Several of the thirteen permit conditions protect the Bosque from unnecessary damage and provide for mitigation of those effects that are unavoidable. EA at 46-47. Special Condition 5 states that "destruction of bosque shall be avoided as much as possible during construction." EA at 46. Special Condition 7 requires revegetation of disturbed Bosque. EA at 46. Special Condition 10 requires mitigation for the four acres of Bosque lost due to the bridge approachways and right-of-way corridor. EA at 47. In the EA the Corps determined that even though habitat loss is minor (0.04% of the 60-mile stretch of Bosque from Bernalillo to Belen. EA at 25), "due to its scarcity in the region and its ecological value, it should be mitigated to lessen the loss of habitat available for wildlife and to provide new or increased-quality areas for displaced individuals." EA at 11. Special Condition 10 requires the City of Albuquerque to acquire "not less than four acres of private riparian or wetland Bosque within the Albuquerque reach of the Rio Grande." The District Engineer must approve the lands designated for mitigation. In addition, the plan for management of the mitigation lands must be coordinated with other resources and agencies and approved by the District Engineer prior to the start of construction. EA at 47.

In addition, the Corps had use of the ecological study of the riparian corridor of the Middle Rio Grande which emphasized the Bernalillo to Belen reach. This final report (Hink and Ohmart 1984) is referenced and quoted throughout the EA. EA at 10-12. See also AR Vol. XIII.

Based on the evidence in the record and the EA, the Court finds that the Corps has met its burden on this issue in that it adequately studied the effects of bridge construction on the Bosque.

**(b) Noise Impacts.**

Plaintiffs allege that the Corps failed to adequately consider noise impacts to the area surrounding the bridge site because they did not obtain new information on noise or independently verify the information relied on and challenged by the plaintiffs. The Corps acknowledges that it relied on the FEIS done by the FHWA in its determination of noise impacts. However, a review of the EA and the record indicates that the Corps updated and made allowance for changes not reflected in the FEIS. Specific references to the noise studies are found in the EA at pp. 1, 13, 16, 18, 24, 25, 35-37 and 41. The record also contains reference to the noise studies at AR Vol. III at 283; AR Vol. VI at 871-73; and AR Vol. XI at 39d-41.

The EA also incorporates measures which must be undertaken to mitigate noise including a "prohibition of heavy commercial vehicles between Coors Boulevard and Fourth Street, construction of noise walls, a depressed roadway section and provisions for pedestrians and bicyclists to allow low-noise alternative transportation modes." (Parks, 1986c, Responses, p. 64). EA at 16; AR

Vol. IV at 443; Vol. VI at 871-73; Vol. X at 49; Vol. XI at 39d-41.

Both the EA and the record reflect that the Corps has therefore adequately studied and documented the noise impacts of the project.

**(c) Air Quality Impacts.**

Plaintiffs claim that the EA fails to include an adequate discussion of the impacts on air quality resulting from the proposed Montaño Project. The record indicates the Corps' conclusion that building the bridge would have a positive effect on air quality by lowering overall carbon-monoxide emissions due to reduced traffic congestion. The Court's role is not to determine the veracity of these statements but to ascertain that there is some reasoned basis for them. The Corps has provided that basis which is found at the EA pp. 15, 24; AR Vol. II at 93-104 (Gerety, Report on Air Quality Impact of New North Valley River Crossings); Vol. VI at 834-45; Vol. VI at 921; Vol. XI at 36-39; Vol. XII at 61; Vol. XIV, Tab B.

Again, this issue was properly and thoroughly treated by the Corps.

**(d) Traffic Flows.**

In indirect response to the plaintiffs' charge that the EA does not fully disclose the traffic impacts along Rio Grande Boulevard, Griegos Road and other secondary and residential streets throughout the North Valley of Albuquerque, the Corps states that it is not required to consider the impacts of non-federal activities. This argument is based on a reading of **Winnebago Tribe of Nebraska v. Ray**, 621 F.2d 269, 272 (8th Cir. 1980) where

the court held that the Corps was not required to consider environmental impacts posed by an entire transmission line, but only those parts of the line which affected navigable waters.

Nonetheless, the Corps does state in the EA that "traffic volumes on these local streets are expected to increase due to the loss of an at-grade intersection at Montaño Rd. and Rio Grande Blvd. . . . [further] the applicant intends to monitor residential traffic and implement mitigation measures as necessary." EA at 21. The Court has found only one other reference in the record to traffic flow impacts on secondary streets. City's Responses to Written Comments, December 1986, p. 20. This response in full is that:

> [i]f it is determined that traffic is funneling through the neighborhood after the Montaño Crossing has been built to the point of disrupting community life, then measures will be taken to discourage such travel patterns by installing traffic control devices and diverters to make such travel undesirable. (Att. 8, p. 20)

In **Foundation on Economic Trends v. Weinberger**, 610 F. Supp. 829 (D.D.C. 1985), the court states that an EA which fails to address a significant environmental concern is an inadequate basis for a reasoned determination that an EIS is not appropriate.

> When taking the requisite hard look at the environmental concern, the agency must provide, in the EA, more than a "checklist" of assurances and alternatives. It must indicate, in some fashion, that the agency has taken a searching, realistic look at the potential hazards and, with

> reasoned thought and analysis, candidly and methodically address those concerns.

610 F. Supp. at 841. The Corps' incorporation of the AR, and the City's promise to monitor traffic flows should they become a problem, is simply not an adequate basis to support their contention that they have acted within the expectations of NEPA. Speculation that the City will deal with a traffic problem is not "reasoned analysis." Furthermore, an after-the-fact solution to the problem of secondary or residential traffic flows cannot be what the framers of NEPA, a prescriptive procedural statute, had in mind. In the absence of any other information which would tend to support the Corps' actions on this issue, this Court is required to find that the Corps' analysis of the impacts of greater traffic flow on the residential neighborhoods is inadequate.

The Corps' contention that it is not responsible for this analysis is treated below in the discussion of "improper segmentation" of the Bridge and Corridor Projects.

**(e) Secondary Land Use Impacts.**

The plaintiffs' fifth allegation under the first claim is that the Corps did not adequately discuss any of the secondary land use impacts implicated by construction of the bridge. The Court is hard pressed to discern the precise nature of this claim. Plaintiffs cite **Davis v. Coleman**, 521 F.2d 661, 674 (9th Cir. 1975) in support of the assertion that growth, increased population, traffic, pollution and demand for services are factors that should be considered by the Corps. As noted above, traffic and pollution are issues specifically raised by the plaintiffs

elsewhere. The population growth of the west side is exhaustively treated throughout the record and EA, and is, in fact, the basis for the assumed need for the bridge. Thus, "growth" and the increased demand for services are the only issues which it can be fairly alleged the defendants did not consider.

Again, the task before the Court is to determine whether the Corps' analysis of these issues is reasonable. This Court accepts the Corps' definition of growth as a phenomenon which is susceptible to subjective interpretations which are dependent on a person's outlook on development generally. "People who support development view these increases as a positive impact; those who are anti-development see the increases as a negative impact . . . some adverse secondary impacts . . . are unavoidable." EA at 24. On that same page, the Corps discusses additional secondary impacts in detail. Given the subjective nature of the problem, and the City's expressed preference for the crossing, the Court finds no basis for holding that the Corps' actions are unreasonable. The effects of growth are considered and catalogued, and the plaintiffs' distaste for that growth is not a basis for requiring an EIS.

**(f) Impacts on Historic Resources.**

NEPA regulations state that the significance of an action requires consideration of its intensity, and that an evaluation of intensity should include the following:

> Unique characteristics of the geographic area such as proximity to historic or cultural resources. . . . The degree to which the action may

> adversely affect districts, sites, highways, structures or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss of [sic] destruction of significant, cultural or historic resources.

40 C.F.R. § 1508.27(b). The New Mexico State Historic Preservation Officer has found that the proposed bridge construction will have an adverse effect on the Los Poblanos Historic District and the John F. Simms House, which are all eligible for the National Register of Historic Places (Att. 5, pp. 16-17).

However, the State Historic Preservation Officer, ("SHPO") also consulted with the Corps in order to develop plans to mitigate the effects that the project would have on the known and unknown historic sites. Pursuant to that consultation, the Memorandum of Understanding between the SHPO and the Corps incorporates several mitigative measures. This consultation process, and the documentation of it, is evidence to the Court that the Corps actually considered the effects of construction on historic sites. The existence of the mitigating plans indicate that a thorough analysis was done and, that to the extent possible, adverse consequences were minimized.

The Corps has therefore met the burden established by NEPA on this issue.

**(g) Impacts on Dietz Farms.**

The plaintiffs have alleged that the Corps of Engineers failed to adequately assess the impacts of the bridge construction on the semi-rural residential neighborhood known as Dietz Farms. This neighborhood abuts

the bridge right-of-way to the south, and the Corps acknowledges that the "bridge structure and roadway area will be partially visible from the Dietz Farms residential area." AR Vol. 1, Tab B, p. 13. However, the plaintiffs acknowledge that the Corps has again provided for mitigating measures which would require planting supplemental trees along the right-of-way and building a six-foot adobe colored noise wall to shield the view. It appears that the plaintiffs' real dispute is not that the Corps didn't adequately study the corridor, but that the Corps came up with mitigative measures that didn't go far enough. Whether the latter is true is a question within the substantive realm of consideration of the agency which this Court will not, and cannot, tread upon. **(Strycker's Bay, supra).**

It cannot reasonably be said that the Corps' analysis of the bridge project's impact on the entire area surrounding the site did not include a study of the impact on Dietz Farms. The Permit Evaluation and Decision Document found at AR Vol. I, Tab B, includes references to the neighborhoods and suggestions for mitigating measures. The plaintiffs' contentions that the trees might not survive after construction is simply speculation which does not form a basis for holding that the EA is inadequate. The Court thus finds that the Corps has met its burden on this issue.

**(h) Impacts of Montaño Corridor Improvements.**

The plaintiffs' allegations on this issue are substantially related to their Claim No. 3 which charges that the Corps improperly segmented the analysis of the Montaño

Project. The Court will defer discussion of impacts of the corridor improvements to the analysis of Claim No. 3.

In summary, the plaintiffs' averments under Claim No. 1 are insufficient to establish that the Corps did not adequately study or analyze the environmental effects of the bridge project, with one exception. The EA contains an adequate statement of the work that the Corps has done and relied upon in reaching its conclusions, but for the discussion of traffic flows on the residential or secondary streets. As noted, the Corps' need to consider secondary traffic flows is treated further in the "segmentation" analysis.

**Analysis of Claim No. 2**

Did the Corps fail to adequately assess alternatives to the Montaño Site/Project?

In their Trial Brief and Motion for Preliminary Injunction, the plaintiffs have listed two separate alleged infirmities in regard to the Corps' alleged decision not to study alternatives to the Montaño site. The plaintiffs rely on **Sierra Club v. Alexander**, 484 F. Supp. 455 (N.D.N.Y. 1980) and **Richland Park Homeowners Ass'n., Inc. v. Pierce**, 671 F.2d 935 (5th Cir. 1982) in support of the averment that the Corps has an affirmative obligation to consider alternatives to a proposal which exists independent of any duty to file an EIS. Relying on the existence of this independent duty, the plaintiffs urge that the Corps should have studied less environmentally egregious alternatives regardless of the City's position on those alternatives. On a related note, the plaintiffs argue that the

alternatives which the Corps must consider are not limited to those within the jurisdiction of the applicant.

Secondly, the plaintiffs argue that the Corps failed to do an independent analysis, which is mandated by NEPA, with regard to information it received from the applicant. Finally, plaintiffs rely on the principle expressed in the case of **Trinity Episcopal School Corporation v. Romney**, 523 F.2d 88 (2nd Cir. 1975), where the Second Circuit held that when a federal agency's search for, or investigation of, alternatives " . . . was either highly limited or nonexistent, remand was required so the agency could study possible alternatives." 523 F.2d at 95.

The relevant factual background is that the Corps chose not to study alternative sites, variously designated "La Cueva," "Roy," "Candelaria," "I-40," etc., because the City determined that the only feasible location for the bridge crossing, and indeed the preferred alternative, was the Paseo del Norte (Paseo) and Montaño crossing combination. This pre-selection by the City, and specifically the Corps' reliance on it, in deciding to extensively study only the Montaño and Paseo crossings, is alleged by the plaintiffs to be unlawful and not in the spirit of NEPA.

In its defense, the Corps replies that:

> there are no reasonable alternative methods or locations available to the applicant to accomplish the purpose of the proposed project. The applicant has reduced the scope of [the] project as much as possible to minimize impacts to the aquatic ecosystem. EA, 44.
>
> Widening the Alameda (Corrales) Bridge is not an alternative that is available to the applicant, the City of Albuquerque. The Alameda Bridge is

> outside the Albuquerque city limits and the right-of-way is owned by the State Highway Department. EA, 4. In addition, the Urban Transportation Policy Planning Board did not select Alameda expansion. EA, 4. The Alameda Bridge is not located where additional river crossing lanes are needed because 88% of all projected river crossing begin or end south of the Paseo del Norte and the Alameda site is north. EA, 5. The Montaño Project is south of Paseo del Norte. Finally, it is uncertain whether the widening of the Alameda Bridge could be accomplished without environmental harm. EA, 4. If so, the project could not be accomplished in the near future. EA, 4. Other sites were considered. EA, 3-5. Federal Defendants' Response to Plaintiff's Motion for Preliminary Injunction, pp. 8-10.

The FEIS was also reviewed and is Volume XI of the Administrative Record. Several alternate sites for building a bridge were analyzed in the FEIS. EA at 3. Thus, there is substantial evidence in the administrative record that alternative sites were fully explored.

The Clean Water Act regulations in regard to § 404 permits provide that:

> No discharge of dredged or fill material shall be permitted if there is a *practicable alternative* to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other signifcant adverse environmental consequences. . . . *An alternative is practicable* if it is available and capable of being done after taking into consideration *cost, existing technology,* and *logistics in light of overall project purposes. If it is*

> *otherwise a practicable alternative*, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered. (emphasis added).

Taking the mandates of these cases and the statutory language into account, the Court must begin with the presumption that failure to consider any practical alternatives, even though they are not recommended by the applicant, is fatal to the Corps' decision not to prepare an EIS. However, this Court finds that none of the alternatives available, or mentioned by the plaintiffs, is reasonable, practicable or capable of completion by the applicant. Therefore, the Corps acted properly in deciding not to engage in further study of those alternative sites. The alternatives and their constraints are found in the FEIS, referenced in the EA, and listed below:

| Alternative | Constraint |
|---|---|
| Candelaria Crossing | *Environmental* – would cut through an oxbow marsh wetland and a nature preserve. |
| Griegos Crossing | *Social* – would require relocation of several families and impact a nearby elementary school. |
| | *Economic* – the right-of-way required would pass through a densely settled area. |

| | |
|---|---|
| Chavez Crossing | *Social* – relocation of families. |
| | *Economic* – no through connection from Coors Blvd. Relocation necessary in densely developed area. Narrow right-of-way on existing facility. |
| Ranchitos Crossing | *Social* – junior high school on proposed roadway, relocation of several families. |
| | *Economic* – no existing right-of-way to I-25. |
| Roy Avenue Crossing | *Geographic* – this is the northernmost alternative and has the least potential for mitigating traffic congestion. |
| Alameda (Corrales) Crossing | *Geographic* – this site is outside of the City's jurisdiction. |
| No Build Alternative | *Social and Economic* – given projected traffic demands this is untenable. All traffic studies indicate a need for additional river crossings. |
| Montaño/Paseo Del Norte | This is the preferred alternative. |

As the Seventh Circuit has made clear "the Corps is entitled not to conduct a further study of alternatives unless the plaintiffs [are] prepared to shoulder the burden of showing that [the applicant] has overlooked some plausible alternative site. . . . " **River Road Alliance v. Corps of Engineers of the U.S. Army,** 764 F.2d 445, 452 (7th Cir. 1985). Although this Court feels that alternatives for accomplishing the overall goal probably exist, the

Court's role is only to assure that the Corps properly studied plausible alternatives. The Corps has taken into consideration all of the alternatives listed above, including the impractical ones, and chosen to focus on the most workable bridge site – Montaño Road. This Court cannot find fault with this decision as it seems unrealistic to require that the Corps study implausible alternatives.

The plaintiffs' second contention in Claim No. 2 is that the Corps failed to independently verify information provided to it by the applicant in regard to alternative sites. In **Sierra Club v. Alexander, supra,** a case substantially relied on by the plaintiffs, the district judge found that where substantial materials on alternatives were presented by the applicant, and a comprehensive review of the project and alternatives was performed by an independent agency, the Corps' obligation to independently investigate alternatives "could reasonably be found to be much less substantial than might otherwise be the case." 484 F. Supp. at 469.

As for the present case, a great deal of material was presented by the applicant which covered every conceived of alternative and the reasons for rejection of those alternatives. In addition, the project and the alternatives were evaluated in the FEIS by the Federal Highway Administration. Moreover, the Corps relied on public commentary and its own review of the material submitted by the applicant. These combined studies and efforts indicate to this Court that the Corps accomplished its mission of independently analyzing the material presented by the applicant. Therefore, it is the Court's judgment that the NEPA regulations and guidelines have been

followed and that the plaintiffs' second claim does not provide a basis for a preliminary injunction or remand.

**Analysis of Claim No. 3**

Did the agency improperly segment the Montaño Crossing Project from the Montaño Corridor improvements?

In their Memorandum in Support of Motion for Preliminary Injunction, the plaintiffs assert that an environmental assessment is inadequate if it fails to discuss the full, cumulative and synergistic effects of inter-related projects because planners have improperly segmented proposals and prevented adequate disclosure of the environmental impacts of the project as a whole. **Highland Cooperative v. City of Lansing**, 492 F. Supp. 1372, 1382 (W.D. Mich. 1980). Plaintiffs argue that the Corps violated NEPA guidelines and its own regulations by improperly segmenting the Montaño Bridge Crossing from the Montaño Corridor improvements. (The Corridor improvements consist of widening and regrading Montaño Boulevard on either side of the proposed bridge in order to accommodate projected traffic increases). Although the Montaño Project includes corridor improvements and the crossing, plaintiffs argue that the EA only discusses the environmental impacts of the bridge component of the project. Relying on *Fritiofson v. Alexander*, 772 F.2d 1225 (5th Cir. 1985), the plaintiffs argue that any proposal which is functionally related must be evaluated in the same environmental analysis.

This Court is not persuaded to accept this expansive reading offered by the plaintiffs. The only activity in this entire project which requires a § 404 permit is the construction of the bridge along the Montaño Road alignment between Coors Road on the west and Rio Grande Boulevard on the east. As this Court held in its ruling on the Motion for Protective Order, the Corps' jurisdiction with regard to this project extends only to that area within the bounds of the permit application. While it is true that the City will widen the Montaño Corridor, it is also apparent from the record that those improvements will proceed whether or not the bridge is built. EA at 22. Thus, this Court is persuaded that building the bridge and widening Montaño Road are separate and independent projects and that Corridor improvements have independent utility for the City.

In reaching this conclusion, the Court has relied substantially on the recent case of **Sylvester v. U.S. Army Corps of Engineers, et al.**, No. 88-15376 (9th Cir., March 27, 1989). There, the Ninth Circuit undertook an extensive analysis of the plaintiff's challenge to the Corps' decision not to require an EIS where the Corps segmented the building of a golf course from the building of a surrounding resort. In that case, NEPA was implicated because construction of the golf course required filling some wetland area. The Corps determined that it need not study the impacts of the entire resort because the developers plan to build the golf course did not "federalize" the entire resort complex. Although the golf course and surrounding resort were geographically intertwined, the Corps fixed the scope of its analysis based on the jurisdictional limitation inherent in the permit.

The district court which first heard **Sylvester** granted a preliminary injunction but, on review, the Circuit vacated the injunction and held as follows. First, that the Corps must follow its own regulations when determining how to comply with the NEPA. Second, that the District Engineer should establish the scope of the NEPA document (e.g. the EA or EIS) to address the impacts of the specific activity requiring a permit and should limit the permitting process to those portions of the project over which the District Engineer has sufficient control and responsibility to warrant federal review. Third, that the District Engineer has control and responsibility where federal involvement is sufficient to turn an essentially private action into a federal action. Fourth, that one factor to be considered in determining control and responsibility is whether or not the regulated activity comprises "merely a link" in a corridor-type project. Having set out the applicable standard, the Ninth Circuit then found that the Corps analyzed the secondary and cumulative impacts of the course and properly determined that other resort facilities were unrelated. The court reasoned that the resort might easily succeed without the golf course thereby tacitly affirming those cases which hold that where independent utility is apparent, federal control cannot be assumed. **See, e.g. Friends of the Earth v. Hintz, supra** and **Enos v. Marsh**, 769 F.2d 1363 (9th Cir. 1985).

In the case at hand, it is clear that the Montaño Corridor improvements might easily be accomplished without the construction of the Montaño Bridge. To that

extent, the federal government would have no jurisdiction over improvements to the Corridor. The act of building the bridge, and the Corps' act of granting the permit, are not sufficient to "federalize" the entire Corridor Project. The Corps of Engineers has followed its own regulations in regard to the permit, has limited the scope of its review properly under the CEQ and NEPA guidelines, and has determined that the road widening is not a federal project. Where the construction in question is not federal, the Corps is not required to consider the environmental impacts of that construction. **Winnebago Tribe of Nebraska v. Ray**, 621 F.2d 269, 272 (8th Cir. 1980) and **Save the Bay, Inc. v. U.S. Corps of Engineers**, 610 F.2d 322, 326 (5th Cir. 1980). This Court is therefore persuaded that the Corps' determination not to look at the environmental impacts of Montaño Corridor improvements is not fatal to their decision to proceed on the basis of an EA, and that the Corps' decision was reasonable. The Court will now answer the question left open in its discussion of traffic flows.

As noted above, the Corps' analysis of traffic flows on residential streets does not withstand the scrutiny required by NEPA. However, secondary traffic flows, like corridor improvements, are outside the scope of the § 404 permit. None of the alleged traffic flow impacts impinge on acreage within the permit bounds. Nor does the Corps have substantial control over the City's means of dealing with these potential traffic flow problems. Therefore, despite the inadequacy of the study on this issue, the Court must find that Corps' actions constitute harmless error. Therefore, plaintiffs' Claim No. 3 is insubstantial as a basis for remand or preliminary injunction.

**Analysis of Claim No. 4**

Did the Corps improperly fail to designate the Bosque as wetlands?

Central to this lawsuit, and the controversy over the Montaño Bridge Project, is the certain destruction, if construction is to continue, of wooded and grass-covered land adjacent to the Rio Grande between the Corrales riverside drain on the west and the Albuquerque drain on the east. The plaintiffs argue that this area of land should be designated a wetland which the Corps has chosen not to do. As the plaintiffs have correctly noted, wetlands are a particularly fragile and important part of the national environmental ecosystem. Because of this, they are specifically protected by § 404 of the Clean Water Act. In considering effects on wetland property, federal agencies are directed to cooperate with one another and consider the project's effects on all natural systems contained within the wetland area. This particular issue has arisen because the Corps, the EPA and the Fish and Wildlife Service have at various times set forth different criteria and standards for classifying wetlands. Furthermore, the FEIS submitted to the Corps, and prepared by the Federal Highway Administration, initially determined that the entire Bosque should be classified a wetland.

Once again, this Court will reiterate its objective to review the procedural constraints imposed by NEPA and not interfere with substantive determinations made by the federal agency in question. Phrased in terms of specific alleged defects, the plaintiffs' argument is that the Corps failed to interact with other agencies when it determined that the Bosque area impacted by the Montaño

Project was not a wetland. Secondly, the plaintiffs argue that a determination that the affected area was not wetland is in direct contrast to the prior determination by the FHWA that the whole Bosque is a wetland.

The administrative record indicates that the Corps followed its own procedures in determining whether the area impacted by the Bosque was a wetland. Andy Rosenau, chief engineer of the regulatory branch, and Jean Manger, a biologist in the regulatory branch, visited the proposed bridge site. AR, Vol. II at 72. Ms. Manger also reviewed and studied the prior FEIS which appears in the administrative record and has been incorporated by the Corps in its EA. The Corps also had the benefit of the Hink and Ohmart study, done for the Federal Highway Administration, which is an extensive and costly document that outlines in detail the various riparian habitat found along both sides of the river corridor. AR at Vol. XIII. Furthermore, the Court evaluated existing data on the region which included U.S. Geologic Survey maps and National Wetland Inventory maps. The Corps prepared its own aerial photography and performed its own field studies of the vegetation, soils and hydrology. The end result of these various studies was the Corps' determination that certain parts of the Bosque are wetlands, but that none of those wetland areas were impacted by the construction of the bridge. This finding is consistent with the study conducted by Drs. Hink and Ohmart. While it is true that there is still some debate as to whether the Corps' determination of wetland is substantively accurate, this Court cannot say that the determination is unreasoned or arrived at in an arbitrary and capricious fashion. Therefore, the Corps' decision not to

designate the affected area as wetland will not substantiate the plaintiffs' claim that an EIS should have been done on this particular project.

**Analysis of Claim No. 5.**

Were the requirements of the Fish and Wildlife Coordination Act met?

The plaintiffs have argued that the Fish and Wildlife Service is required, pursuant to the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 et seq., to make recommendations to the Corps on the wildlife aspects of a § 404 permit. These recommendations are to be as specific as possible and to describe the damage to wildlife attributable to the project in question.

If construction is to occur at the Montaño site, approximately four acres of Bosque will be permanently and unavoidably lost by the bridge approachways and right-of-way corridor. AR, Vol. I, Tab B at p. 11. Through a series of letters, the Field Supervisor of the Fish and Wildlife Service informed the Corps' District Engineer that varied and serious impacts on wildlife which reside in and around those four acres will occur. This impact is not disputed by the Corps. However, the Corps points out that the Field Supervisor of the FWS suggested to the Corps a series of mitigating measures which the Corps should follow in issuing its permit. It is apparent from a review of the permit that the mitigating factors suggested by the FWS were incorporated and made special conditions of the permit. This is determined by comparing the series of letters from the Field Supervisor to the special conditions in the permit, specifically conditions three,

five, six, seven, ten, eleven and twelve. AR, Vol. I, Tab A at 2, 4. It appears that the Fish and Wildlife Service had no objections to the issuance of the permit in addition to those covered by the mitigation requirements. It is therefore clear to this Court that the Corps requested and received the input of the Fish and Wildlife Service and followed its recommendations. Further, plaintiffs' suggestion that the FWS should have recommended the no build alternative is of little merit, since this is a matter left to the discretion of the FWS Filed [sic] Supervisor. Plaintiffs cannot prevail on this claim since it appears that the Corps has consulted with the FWS and come to a reasoned conclusion as to the nature of the impact on the immediately affected Bosque area.

**Analysis of Claim No. 6**

Was the Corps' decision to grant the § 404 permit based on the EA, and not an EIS, arbitrary and/or capricious?

As the foregoing analysis demonstrates, on virtually every challenge submitted by the plaintiffs, the Corps is able to document, from the administrative record, its study of various impacts of the Montaño Project. It does not appear from the record that the Corps intentionally neglected study of any specific area or impact, nor does it appear from the record that the Corps specifically excluded studies which were contrary to its findings. In several regards, the Corps made decisions which are disputed by various individuals and groups, but those were substantive decisions which this Court is not bound to review. It does not appear from the record that the Corps

was unreasoning or less than thorough in its study of the project.

The sole exception to this finding is the Corps' lack of study of the impacts on secondary and residential streets caused by the construction of the bridge. As stated above, the Corps' lack of analysis of this single, and tangential, impact is not of sufficient import to require that a preliminary injunction be granted. Secondary traffic flows are but one factor, and a small one at that, in the overall scheme of this project. Moreover, the analysis of those impacts is outside the jurisdiction of the Corps.

On balance then, this Court cannot find that the Corps' decision to grant the permit was either arbitrary and capricious or unreasonable. Therefore, the plaintiffs have not established a substantial likelihood that they will prevail on the merits of this claim. Although this Court might disagree with the decision to construct the bridge on the preferred site, the Corps' analysis of the project is adequate and fulfills the various requirements of NEPA and the Clean Water Act.

## PART II

The second requirement under the preliminary injunction test is whether the movant will suffer irreparable injury. This Court concludes that irreparable injury will certainly accrue if construction is allowed to proceed. Testimony at the Temporary Restraining Order hearing held in early April, and the subsequent evidentiary hearing established that the City is in the ongoing process of condemning land and letting contracts. That the City will

proceed with construction of the bridge absent an injunction is certain.

It is also beyond doubt, and admitted by all parties, that construction will cause irretrievable damage to the affected Bosque site. Rights-of-way will be cleared, trees will be uprooted and the act of cutting a corridor through the Bosque will bring about the predicted environmental harms. Given these factors, a finding of irreparable injury is compelled.

## PART III

The Tenth Circuit has stated that the movant must show that the injury prevented by granting an injunction will not be outweighed by the harm caused to the non-movant. **Lundgrin v. Claytor, supra**. The Court finds that the plaintiffs have not met this burden.

The testimony in this case is to the effect that delays in commencement of bridge construction will cause the City to have to re-bid the construction contracts thereby undoing the work the City has already accomplished in selecting the contractor.

Further argument established that construction delays will exacerbate traffic conditions by causing additional congestion due to the ever-increasing number of commuters from the west side. The Court will take judicial notice of the common sense proposition that more traffic means more accidents and hazards to the public, and that delays implicate questions of public safety. For these reasons, the balance of the equities weighs in favor of the defendants.

## PART IV

The final test in determining whether to grant a preliminary injunction is whether the injunction, if issued, would be adverse to the public interest. The Court finds that an injunction would be adverse to the public interest and therefore finds that the plaintiffs have not met their burden on this final test. In coming to this conclusion, the Court has carefully balanced the needs of the Albuquerque metropolitan area, as described in traffic flow analyses, projections for future growth, and the decisions of elected representatives, against the environmental consequences of this action and the opposition to the Montaño Project from citizens and residents who will be impacted by the construction and assumed eventual completion of the Project. The Court would note that in balancing these positions, an exceedingly complex array of issues has arisen. These issues range from the protection of skinks and whiptail lizards to questions regarding impacts on an entire City's character and future development. While this conclusion has not been particularly easy for the Court to reach, on balance the transportation and growth needs of the City, as expressed by its residents in their continued support of bond allocations for the construction of the bridge, outweigh the various detriments which will be caused by the Project. For these reasons, an injunction would be more detrimental to the public interest than would this Court's refusal to enter such an injunction thereby allowing construction to proceed.

The Court is not persuaded that the Corps acted in a hasty or unreasonable manner, nor is it persuaded that a further and more elaborate study which might encompass

every single conceivable detail concerning the impacts of this project would substantially benefit residents of the City of Albuquerque. Therefore, it is this Court's decision that the plaintiffs have not met their burden with regard to part four of the preliminary injunction test.

## CONCLUSION

The grant or denial of a preliminary injunction is within the discretion of the trial court. **Continental Oil Co. v. Frontier Refining Co.**, 338 F.2d 780 (10th Cir. 1964). The plaintiffs in this case have met their burden on only one of the four tests established by the Tenth Circuit – irreparable injury. As noted above, the plaintiffs might still prevail, absent a showing of substantial likelihood of success on the merits if the balance of hardships tips decidedly in their favor, *and* the issues raised are so serious, substantial, difficult and doubtful as to make them a fair ground for litigation. **Id.** at 781 (emphasis added). Here, however, the balance of hardships weighs in favor of the defendants, and it is not substantially likely that the plaintiffs will prevail at the trial on the merits. Finally, since the interests of the public are best served by denying the injunction, the Court has no alternative but to act accordingly.

Based on the foregoing discussion, a review of the memoranda of the parties, the evidence offered to the Court, closing arguments of counsel, and a review of the applicable law, the Court finds that the Motion for Preliminary Injunction which would enjoin construction of the Montaño Bridge Project is not well-taken and should

be denied. An Order in conformance with this conclusion will be entered by this Court of even date.

DATED this 26th day of May, 1989.

/s/ John E. Conway
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

VILLAGE OF LOS RANCHOS DE ALBUQUERQUE, et al.,
Plaintiffs,

vs. No. Civ. 88-1032JC

LT. GENERAL HENRY J. HATCH, et al.
Defendants.

MEMORANDUM OPINION AND ORDER

(Filed May 11, 1989)

This matter is currently before the Court on the Defendant's Motion to Compel Immediate Depositions, filed May 9, 1989. Having reviewed the most recent memoranda of the parties, the record, and the applicable law the Court finds that the defendants motion is well taken and will be granted in accordance with the restrictions outlined below.

A review of the case file indicates that the recent flurry of eleventh hour activity is due largely to the parties failure to conduct discovery in an orderly manner. The Complaint in this cause, alleging that the Corps of Engineers improperly issued a §404 permit under the Clean Water Act, 33 U.S.C. §1344, was filed on August 29, 1988. No attempt at discovery was made by either party until March 2, 1989 when the plaintiffs Noticed the depositions of four individuals. There is no reason that these depositions could not have been noticed soon after the defendants filed their Answer. This five month delay is inexcusable. On March 9, the the [sic] plaintiffs filed a

certificate of service for Plaintiffs First Set of Interrogatories. This first set of interrogatories became the subject of the federal defendant's Motion for Protective Order, dated March 17, 1989. The basis for the Motion for Protective Order was that any review of the Corps of Engineers decision to grant the §404 permit was limited to the administrative record, and was therefore not appropriate for additional discovery.

In its Order of May 8, 1989, this Court ruled that of the five claims for relief enumerated by the plaintiff, only the claim which questioned the Corps of Engineers analysis of the impact on the Bosque of "fracturing" was susceptible to the possible admission of evidence outside of the administrative record. For the purpose of determining whether such additional evidence is indeed appropriate, the Court has set a *very limited* evidentiary hearing in conjunction with the preliminary injunction hearing. "The sole purpose of the evidentiary hearing will be to hear proffered testimony on the **issue of the Corps of Engineers analysis** of the impact of fracturing on the Bosque." Order of May 8, 1989 at pg. 15, (emphasis added).

The fracturing issue is restricted to two questions. First, in conducting their analysis of the environmental impact of the Montano Project, did the Corps improperly divide the Bosque into two segments, then study the segments individually, thereby improperly assessing the impact if the project on the Bosque as a whole? Second, if the Corps of Engineers properly conducted an initial study of the Bosque as a whole, did they adequately address the negative consequences which might result

from fracturing the Bosque? This Court will now indicate for the second time that the only testimony which will be allowed at the evidentiary hearing will be that which directly relates to the manner in which the Corps of Engineers undertook their study of the Bosque, and whether that process passes statutory muster. The evidentiary hearing is not an opportunity for the parties to establish an additional evidentiary basis for those issues that this Court has deemed restricted to the administrative record.

Given these guidelines, the Court will order that the parties conduct that discovery, including depositions, which may be accomplished in good faith by the morning of the evidentiary hearing, which relates to the issues as defined in the foregoing paragraph.

**WHEREFORE,**

**IT IS ORDERED, ADJUDGED AND DECREED** that the defendant's Motion to Compel Immediate Depositions is **granted**, but is limited to discovery which falls within the guidelines established in the body of this Order.

Dated this 11th day of May, 1989.

/s/ Juan G. Burciaga
United States District Judge
for Hon. John E. Conway

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF NEW MEXICO**

VILLAGE OF LOS RANCHOS DE ALBUQUERQUE, et al.,

Plaintiffs,

vs. No. CIV 88-1032 JC

LT. GENERAL HENRY J. HATCH, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed May 8, 1989)

THIS MATTER is now before the Court on the defendant City of Albuquerque's Motion to Dismiss for Failure to State a Claim, filed March 13, 1989; the defendant City's Motion for Protective Order, filed March 13, 1989; the federal defendants' Motion for Protective Order, filed March 17, 1989; and the defendant City's Motion to Dismiss for Lack of Standing and Estoppel, filed March 23, 1989. Having reviewed the memoranda of the parties and the applicable case law, and being otherwise fully advised in the premises, the Court finds that the first Motion to Dismiss is not well-taken and will be denied. The second Motion to Dismiss is well-taken and will be granted. The City's Motion for Protective Order is moot, and the federal defendants' Motion for Protective Order is well-taken in part and will be granted in part. The Court's reasoning is set forth below.

## PART I – MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

On August 29, 1988 the plaintiffs commenced this action alleging that the Army Corps of Engineers, the U.S. Fish and Wildlife Service and the City of Albuquerque violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, § 404 of the Clean Water Act, 33 U.S.C. § 1341 and the Fish and Wildlife Coordination Act, 16 U.S.C. § 662, in granting Army Permit No. NM-OYT-0458 to the City of Albuquerque for construction of one aspect of the Montano Bridge and Corridor (Montano Project).

The sole basis for the City defendant's Motion to Dismiss for Failure to State a Claim is that the plaintiffs' reliance on 28 U.S.C. § 1331 and § 1361 as jurisdictional basis is misplaced. The City suggests that the current action can be sustained only by a petition for judicial review under the Administrative Procedures Act (APA), 5 U.S.C. § 706(2)(A).

A review of the applicable case law suggests that the defendant's position is not well-taken, and that the plaintiffs have properly pled jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 706. In *Califano v. Sanders*, 430 U.S. 99 (1977), the Supreme Court indicated that the 1976 modifications to § 1331 jurisdiction conferred "jurisdiction on the federal courts to review agency action, regardless of whether the APA of its own force served as a jurisdictional predicate." This Court is guided by *Califano* and further finds that the APA specifically contemplated U.S. District Court review of agency actions. Title 5 U.S.C. § 702, entitled "Right to Review" specifically states that

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

This jurisdictional axiom was also recognized in *Friends of the Earth v. Hintz*, 800 F.2d 822 (9th Cir. 1986), a case presented to this Court by the defendants. There the circuit court found that the plaintiff's suit seeking judicial review of an Army Corps of Engineers issuance of a permit under § 404 or the Clean Water Act, 33 U.S.C. § 1344, was properly based on 28 U.S.C. § 1331 as well as 33 U.S.C. § 1365. *Id.* at 827.

The Court finds that paragraph 2 of the Complaint properly alleges § 1331 jurisdiction, and that paragraph 3 of the Complaint properly alleges review under the APA at § 706. Both paragraphs are incorporated by reference into each of the claims for relief; therefore, jurisdiction is properly based.

The allegation of § 1361 jurisdiction as it appears in the Complaint is redundant. In the plaintiffs' Response to Motion to Dismiss, filed April 5, 1989, plaintiffs explain that they are seeking mandamus relief under 28 U.S.C. § 1361 based on the duty of the Fish and Wildlife Service to recommend adequate mitigation. Plaintiffs seek an order compelling the Fish and Wildlife Service to recommend adequate mitigation as pertains to the Montano Project. However, a review of § 706 indicates that the relief requested may properly be granted within the framework of the APA. Section 706(1) provides that the reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed." Plaintiffs' claim of

jurisdiction pursuant to § 1361 will therefore be relegated to the dust bin of legal excess.

## PART II – DEFENDANT'S MOTION TO DISMISS FOR LACK OF STANDING AND ESTOPPEL

In their motion dated March 23, 1989 the City defendants have moved to dismiss on grounds that the plaintiffs lack standing to assert the claims alleged in the Complaint against the City. The basis for the defendants' claim is that the action in question is the federal agency's granting of the § 404 permit and that the plaintiffs' claim is against the sufficiency of the permit as opposed to any City action. The City asserts that there is no right of action created by any federal statute which would allow the plaintiff to proceed against it. Finally, the City urges that even if proof of a federal permitting violation occurred, such a violation would not form a basis for an injunction against a wholly non-federal project which is in fact the City's exercise of its police power. The City concedes that it has relied on the validity of the permit, but it also states that its actions to date, specifically those related to the widening of Montano Road, would have occurred regardless of the issuance of the permit, and are at any rate within the legal scope of the City's authority.

On the other hand, the plaintiffs argue that NEPA covers all proposed actions and impacts of a project whether those actions are taken by federal or non-federal actors. The plaintiffs urge that all impacts of a project, past, present and reasonably foreseeable are covered by

the NEPA umbrella under 40 C.F.R. § 1508.7. Thus, plaintiffs argue, the City is properly named as a defendant since its actions are a reasonably foreseeable consequence of the issuance of the § 404 permit. The plaintiffs further allege that the § 404 permit enabled the City to pursue the construction of the Montano Corridor and Bridge, and as such the non-federal action is completely linked to and dependent on the Corps' § 404 permit. On that basis, the plaintiffs argue that an injunction against the City would be properly and correctly granted by this Court. This reasoning is explained below.

As the defendants correctly point out, standing to sue has traditionally been accorded those "injured in fact" or "adversely affected" or "aggrieved" by actions of the defendants. *U.S. v. SCRAP*, 412 U.S. 669 (1973). In *Allen v. Wright*, 468 U.S. 737 (1984), the Supreme Court stated that the "injury" must be fairly traceable to the challenged action, and relief from the injury must be "likely" to follow from a favorable decision. An association has standing to sue if individual members of the association have a cognizable personal interest at stake and if individual members have been "injured in fact." *Sierra Club v. Morton*, 405 U.S. 727 (1972). The Tenth Circuit has held that associations seeking review only need allege facts showing that individual members are adversely affected as individuals. *Citizens Concerned for Separation of Church and State v. City and County of Denver*, 628 F.2d 1289 (10th Cir. 1980); *Mountain States Legal Foundation v. Costle*, 630 F.2d 754 (10th Cir. 1980). Finally, in *Save the Bay v. United States Corps of Engineers*, 610 F.2d 322 (5th Cir. 1980), the court ruled that aesthetic and environmental injury to

members of an association who reside in the geographic area of concern is sufficient to grant standing.

This Court now finds that plaintiffs have properly alleged facts in their Complaint sufficient to grant standing to the Village, the Rio Grande Valley Preservation Society, and the individual plaintiffs to bring this cause against the federal defendants. The plaintiffs will be adversely affected by the Montano project and thus all have a personal stake fairly traceable to and causally connected to the challenged conduct of the federal defendants.

The Village of Los Ranchos meets the standing test because residents of the Village live in or near the Montano Corridor and use the Bosque and thus will be affected by the numerous impacts of the Montano Bridge and Corridor. Individual plaintiffs have standing because they live in or near the proposed Montano Corridor and use the Bosque and thus will be affected by the environmental impacts. The Rio Grande Valley Preservation Society has standing because many individual members of the organization live in or near the proposed Montano Corridor and use the Bosque and thus will be affected by the environmental impacts associated with the project. Mr. Arnold Sargeant, a resident of the Bosque area, testified without objection at the temporary restraining order hearing before this Court on March 30, 1989 that individual members of the Rio Grande Valley Preservation Society use and enjoy the Bosque on a regular basis. He also testified that one of the purposes of the organization is to protect the Bosque. These interests give the Rio Grande Valley Preservation Society organization standing in this case.

Having clearly established that the plaintiffs have standing to sue, the question before the Court is whether that standing extends to the claims against the City. It is this Court's opinion that it does not. In reaching this decision, the Court has relied heavily on two separate themes. First, the actor which has caused or will cause the alleged injury is the federal agency through the granting of the § 404 permit. The City has in no manner been involved in the permitting process but for its initial request for the permit. Thus, it cannot fairly be said that the City is an actor whose conduct is causally related to the injury claimed by the plaintiff.

Secondly, however, the Court specifically notes that in the event that an injunction should prove warranted, the Court's grant of said injunction would have the same effect on the City as a non-party as it would on the City and federal defendants as parties. This reasoning is explained below.

In urging that standing in fact exists, the plaintiffs rely in considerable part on the case of *Fritiofson v. Alexander*, 772 F.2d 1225 (5th Cir. 1985). There the plaintiffs sued a private developer, along with federal officials, to prevent construction of a waterfront housing development before preparation of a proper environmental impact statement. The Fifth Circuit Court of Appeals upheld an injunction against the developer when it found that the Corps had improperly declined to study related cumulative impacts of the development. (The Fifth Circuit only affirmed the district court's injunction insofar as it prohibited the private developer from performing additional work on the land in question **which was within the**

**jurisdiction of the Corps**. The court did not enjoin development outside of the permit area). Though somewhat unclear, it appears that the plaintiffs rely on the implicit assumption in *Fritiofson* that the court would not have enjoined the defendant developer if the plaintiff lacked standing to sue that party.

This Court deduces from *Fritiofson* that in a NEPA claim where a private developer proposes development on land under the jurisdiction of a federal agency for permitting purposes, the developer may properly be enjoined if there is a finding that the EIS or EA relied upon as a basis for the permit is legally deficient.

It is also well established that a court order granting injunction "is binding upon parties to an action . . . and upon those persons in active concert *or* participation with them who receive actual notice of the order." *U.S. v. Hall*, 472 F.2d 261 (emphasis added). Furthermore, a court may bind non-parties to terms of an injunction to preserve its ability to render a judgment in a case over which it has jurisdiction. *Vuition et Fils S.A. v. Carousel Handbags*, 592 F.2d 126 (2nd Cir. 1979). Having considered the rulings in *Fritiofson*, *Hall* and *Carousel Handbags*, the Court now determines that dismissal of the City of Albuquerque will not substantially prejudice the plaintiffs' rights under the NEPA. While it is admittedly true that the plaintiffs will not be able to raise a claim against the City directly, it is also true that to date they have not established a basis for doing so. On the other hand, while the City defendants will be excused from formal pleading, their actions in regard to the project will still be significantly dependent upon the validity of the permit. It is this Court's belief

that this approach to the litigation focuses the considerable light shed by the adversary process on the core issue: Is the § 404 permit valid?

Having reached this conclusion, the Court will grant the City's Motion to Dismiss for Lack of Standing. The issue of estoppel need not be reached. The Court will also deny the City's Motion for Protective Order as moot and order that the City defendants need not respond to plaintiffs' propounded interrogatories.

## PART III – FEDERAL DEFENDANTS' MOTION FOR PROTECTIVE ORDER

The federal defendants base their motion on the assumption that any action seeking judicial review of the Corps of Engineers issuance of the § 404 permit must be determined solely on the complete administrative record. Therefore, any additional discovery would not and could not lead to competent admissible evidence.

The general rule is that judicial review of agency action is limited to a review of the administrative record. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), *Camp v. Pitts*, 411 U.S. 138 (1973). In addition, the courts have clearly indicated that in actions brought requesting relief under APA § 706(2)(A) – which seek to set aside agency findings as arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law – the record available to the court is limited to the record of proceedings available to the administrative agency. *Citizens to Protect Overton Park v. Volpe*, 401 U.S. 402 (1971), *Friends of the Earth v. Hintz*, 800 F.2d (9th Cir. 1986), *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897

(5th Cir. 1983) (holding that the judicial review of agency determinations conducted under § 706(2)(B) and (C) is also limited to the administrative agency record).

The courts have clearly indicated that § 706(2)(E) review is also limited to the administrative agency record. *Roberts v. Morton*, 549 F.2d 158 (10th Cir. 1977) and *Fishback v. U.S.*, 519 F.Supp. 190 (D.N.M. 1981).

Plaintiffs' acknowledge that of their five claims for relief, the third and fourth claims, which challenge the actions and decisions of the Corps in regard to the § 404 permitting process, are clearly within the scope of APA § 706(2)(A) review. Thus, there can be no dispute that this Court should only review those claims based on the complete administrative agency record. Given this scenario, the Court will only supplement the administrative agency record if it appears that "there is such a failure to explain administrative action as to frustrate effective judicial review." *C.F. & I. Steel Corp. v. Economic Development Administration*, 624 F.2d 136 (10th Cir. 1980).

Plaintiffs urge that there exist several exceptions to the general rule limiting the reviewing court to the administrative record, and that those exceptions apply to the first, second and fifth claims for relief. One such exception encompasses claims brought pursuant to the procedural requirements of NEPA. On that basis, the plaintiffs urge that additional discovery is appropriate on its first and second claims for relief which are premised on NEPA, 42 U.S.C. § 4321, *et seq.* The Tenth Circuit has had occasion to clarify this issue in a context substantially similar to the current cause. In *National Helium Corp. v.*

*Morton*, 486 F.2d 995 (10th Cir. 1973), the court was presented with a challenge to the sufficiency of an EIS which the Secretary of the Interior had used as a basis for the decision to terminate certain helium purchase contracts. This appeal[1] was based on the district court's ruling that the department had failed to comply with the mandate of NEPA because the EIS was essentially lacking in depth.

For the purposes of this case, the relevant portion of the Tenth Circuit's opinion is found in Part II beginning at page 1001. There, the court illustrates and explains that the record available to the reviewing district court is dependent on the type of action being reviewed. When called upon to assess the **adequacy** of an impact statement, the Tenth Circuit held that a court was not reviewing agency action within the meaning of the APA. The court acknowledged that a review of agency action *per se* would be forbidden by the Supreme Court's ruling in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), but found that a review of the adequacy of the EIS was in the realm of a review of a NEPA procedural requirement which was a prerequisite for agency action, and not a review of agency action itself. Rejecting the motion that the arbitrary and capricious standard found

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[1] The Tenth Circuit had ruled on three previous appeals in the same cause of action. In the first appeal, 455 F.2d 650 (10th Cir. 1971), the court upheld the district court's ruling that contracts entered into pursuant to the Helium Act could not be terminated without the filing by the Interior Department of an Environmental Impact Statement in accordance with 42 U.S.C. § 4321, *et seq.* The court held specifically that the Interior Department was required to comply with the provisions of the NEPA.

at § 706(2)(A) was the appropriate benchmark, the court indicated that in assessing alleged violations of NEPA, the rule of reason and objective good faith compliance were the proper standards.

This Court is guided by the distinction drawn in *National Helium*. Since the APA § 706(2)(A) guideline is not applicable in determining the adequacy of an EIS under NEPA, it would be unwise for this Court to uphold a protective order on the basis of an inapplicable standard of review. Having come to this conclusion, the question now before the Court is whether new evidence, or evidence outside the administrative record, may be introduced for the purposes of determining whether NEPA procedural guidelines have been followed.

The judicial response to this question has been a uniform acceptance and recognition of the need for evidence beyond the administrative record, in cases where the plaintiff has alleged that an EIS neglects to mention a serious environmental consequence, failed to adequately discuss some reasonable alternative, or otherwise swept "stubborn problems or serious criticism under the rug." *County of Suffolk v. Secretary of Interior*, 526 F.2d 1368 (2nd Cir. 1977). *Accord*, *A.T.S.&F. R.R. Co. v. Callaway*, 459 F.Supp. 188 (D.D.C. 1978); *Como-Falcon Coalition v. U.S. Dept. of Labor*, 465 F.Supp. 850 (D.Minn. 1978); *American Petroleum Institute v. Knecht*, 456 F.Supp. 889 (D.Cal. 1978), *National Indian Youth Council v. Andrus*, 501 F.Supp. 649 (D.N.M. 1980).

In addition the Court has been advised of the numerable cases where testimony outside the administrative record has been admitted or presented at an evidentiary

hearing. *See, Sierra Club v. Stamm*, 507 F.2d 788 (10th Cir. 1974); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973) *Friends of the Earth v. Coleman*, 513 F.2d 295 (9th Cir. 1975); *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974).

The plaintiffs seek to supplement the administrative agency record as regards their claims for relief under NEPA with evidence related to four separate issues:

1. The analysis and impact of the fracturing of the Bosque;

2. The impact to local residents of the widening of Montano Road between Fourth Street and Rio Grande Boulevard;

3. The failure of the Corps to do a study or require the City to undertake a study of the actual noise, air quality and water depletion impact which would result from the Montano Project; and

4. The failure of the Corps to analyze the alternative of widening the Alameda Bridge and compare that impact with that of the Montano Project.

This Court must now determine whether the requested supplementation is both necessary and in conformance with the scope and nature of the NEPA claims.

It is clear that evidence which indicates that the impact of the fracturing of the Bosque was not adequately studied is of the type specifically contemplated by the court in *County of Suffolk*, since the plaintiff has alleged that an EIS "neglects to mention a serious environmental consequence." 562 F.2d at 1385. The federal defendants

object to additional evidence on this topic on two grounds. First, defendants assert that they have not proffered evidence that suggests that a study of the impact of fracturing of the Bosque was not adequately done. Second, the federal defendants assert that a sufficient study was indeed undertaken, and that the results of the study appear in the agency record, at pgs. 25-27 of the Environmental Assessment.

The defendants' first contention, while accurate, does not take into consideration the fact that plaintiffs have not been allowed discovery to this point and therefore their failure to proffer evidence pertaining to the importance of a thorough study of the fracturing of the Bosque is excusable. Defendants' second contention is somewhat more troublesome to the Court. While this Court acknowledged that it has no right to substitute its own judgment for the decision-making process of the agency, it is also the law that a NEPA claim "raises issues sufficiently important to permit the introduction of new evidence in the district court, including expert testimony with respect to technical matters. . . . " *County of Suffolk*, 562 F.2d at 1385. This Court will be guided by the wisdom of those courts which have allowed additional testimony to be presented at an evidentiary hearing. *Supra*. Having heard the proferred testimony, the Court will then rule on the admissibility of the additional evidence. The Court will therefore schedule an evidentiary hearing prior to, or in conjunction with, the motion for preliminary injunction hearing already set. For reasons outlined below, the **sole** purpose of the evidentiary hearing will be to hear proffered testimony on the issue of the Corps of Engineers' analysis of the impacts of fracturing on the Bosque.

Having temporarily placed the cart before the horse, the Court now returns to the plaintiffs' request for additional discovery on the issues of widening Montano Road, the Corps' lack of a noise, air quality and water depletion impact analysis and lack of analysis on the Alameda alternative.

As the federal defendants have noted in their Reply in Support of Motion for Protective Order, this case is brought to remedy federal action in connection with the issuance of the § 404 permit. While it is true that the permit forms the indispensable basis for any construction of the bridge, it does not follow that the federal agency should be required to analyze the effects of non-federal action in connection with completion of the Montano Project. Federal action, though major, does not encompass the City's avowed intention to widen Montano Road regardless of construction of a new bridge. This is wholly a City managed and supervised project which might easily be accomplished without a § 404 permit. Likewise, the decision to grant a § 404 permit does not and need not concern itself with the noise, air quality and water depletion effects of the City's aspect of the project. It appears from the record that the Corps of Engineers' chief task was to determine the effects of the dredge and fill aspects of the construction phase of the project. Additional analysis is simply beyond the scope of the requested permitting process.

Turning then to the issue of the alleged lack of due consideration given the Alameda alternative, the Court has difficulty in imagining what additional evidence might be introduced to shed light on the Corps' decision-making process. The record indicates that the Corps did

not consider the Alameda alternative due to the fact that the Alameda site lies outside the jurisdiction of the City of Albuquerque. This Court sees no basis for additional testimony on this issue as the basis for the Corps' decision is clear, and additional testimony will not make it clearer. While it may be that the extra-territoriality of the Alameda site is of itself an insufficient basis to reject consideration of the site, that is an issue which is not currently before the Court. The defendants will therefore not be required to respond to discovery requests on the Alameda alternative site issue.

The fifth claim for relief challenges the alleged failure of the Fish and Wildlife Service to recommend adequate mitigation for the alleged negative impacts to fish and wildlife caused by the completion of the Montano Project. As the Court noted in Part I above, such relief is specifically contemplated in the APA; therefore, the appropriate scope of review on this issue is found within the APA.

The problem presented to the Court then is whether additional evidence may be used to supplement the administrative agency record in APA § 706(1) cases. The Court has previously noted the general rule requiring that judicial review be limited to the administrative agency record. *Infra* at p. 10. The Court has not been presented with, nor has it discovered on its own, any basis for not applying the general rule. The plaintiffs have listed no exception to the rule applicable to § 706(1) cases. Therefore, the Court will follow the general rule and restrict the parties to the administrative agency record. The Court will not allow additional discovery or testimony on the issues related to the plaintiffs' fifth claim for relief.

Wherefore,

**IT IS ORDERED, ADJUDGED AND DECREED** that the defendant City of Albuquerque's Motion to Dismiss for Failure to State a Claim, filed March 13, 1989 is **denied**. The defendant City of Albuquerque's Motion to Dismiss for Lack of Standing, filed March 23, 1989 is **granted**. The defendant City of Albuquerque's Motion for Protective Order is moot, and is therefore **denied**. The federal defendants' Motion for Protective Order is **granted** pursuant to the following restrictions:

1. The federal defendants are not required to respond to interrogatories or other discovery requests concerning the impact to local residents of the widening of Montano Road between Fourth Street and Rio Grande Boulevard;

2. The federal defendants are not required to respond to interrogatories or other discovery requests concerning their decision not to, or the alleged failure to, undertake a study, or require the City to undertake a study of the actual noise, air quality and water depletion impact which would result from the Montano Project.

3. The federal defendants are not required to respond to interrogatories or other discovery requests concerning their alleged failure to study the Alameda alternative bridge site.

4. The federal defendants are not required to respond to interrogatories or other discovery requests concerning the alleged failure of the Fish and Wildlife Service to recommend adequate mitigation.

5. The federal defendants are hereby directed to comply with the plaintiffs' discovery requests immediately regarding its study of the impact of the fracturing of the Bosque.

With respect to the issue presented in restriction #5 above, the federal defendants' Motion for Protective Order is denied.

IT IS FURTHER ORDERED that an evidentiary hearing will be held at 8:30 a.m. on Monday, May 15, 1989 for presentation of testimony regarding the impacts of fracturing on the Bosque. The parties will be notified by subsequent order of that setting.

DATED this 8th day of May, 1989.

/s/ John E. Conway
United States District Judge

U.S. CONST. AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## ADMINISTRATIVE PROCEDURES ACT

### 5 USC § 701. Application; definitions

(a) This chapter [5 USCS §§ 701 et seq.] applies, according to the provisions thereof, except to the extent that –

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

* * *

(Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 392.)

### 5 USC § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or

equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 392; Oct. 21, 1976, P. L. 94-574, § 1, 90 Stat. 2721.)

**5 USC § 704. Actions reviewable**

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

* * *

(Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 392.)

**5 USC § 706. Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(f) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat, 393.)

## NATIONAL HISTORIC PRESERVATION ACT

**16 USC § 470f. Effect of Federal undertakings upon property listed in National Register; comment by Advisory Council on Historic Preservation**

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under title II of this Act [16 USCS §§ 470i et seq.] a reasonable opportunity to comment with regard to such undertaking.

(Oct. 15, 1966, P.L. 89-665, Title I, § 106, 80 Stat. 917; Sept. 28, 1976, P.L. 94-422, Title II, § 201(3), 90 Stat. 1320.)

## CLEAN WATER ACT

### 33 USC § 1344. Permits for dredged or fill material

**(a) Discharge into navigable waters at specified disposal sites.** The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

**(b) Specification for disposal sites.** Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 403(c) [33 USCS § 1343(c)], and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

**(c) Denial or restriction of use of defined areas as disposal sites.** The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after

notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

**(d) "Secretary" defined.** The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

* * *

(June 30, 1948, ch 758, Title IV, § 404, as added, Oct. 18, 1972, P.L. 92-500, § 2, 86 Stat. 884; Dec. 27, 1977, P.L. 95-217, § 67(a), (b), 91 Stat. 1600.)

## NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

### 42 USC § 4321. Congressional declaration of purpose

The purposes of this Act [42 USCS §§ 4321 et seq.) are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

(Jan. 1, 1970, P.L. 91-190, § 2, 83 Stat. 852.)

### 42 USC § 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act [42 USCS §§ 4321 et seq.], and (2) all agencies of the Federal Government shall –

> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act [42 USCS §§ 4341 et seq.], which will

insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to

the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

* * *

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and longrange character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act [42 USCS §§ 4341 et seq.].

(Jan. 1, 1970, P.L. 91-190, Title I, § 102, 83 Stat. 853; Aug. 9, 1975, P.L. 94-83, 89 Stat. 424.)

## 33 CFR PART 230 – PROCEDURES FOR IMPLEMENTING NEPA, CORPS OF ENGINEERS (1991)

### 33 CFR § 230.10 Environmental Assessments (EA).

(a) *Purpose.* An EA is a brief document which provides sufficient information to the district commander on potential environmental effect of the proposed action and, if appropriate, its alternatives, for determining whether to prepare an EIS or a FONSI (40 CFR 1508.9). The district commander is responsible for making this determination and for keeping the public informed of the availability of the EA and FONSI.

(b) *Format.* While no special format is required, the EA should include a brief discussion of the need for the proposed action, or appropriate alternatives if there are unresolved conflicts concerning alternative uses of available resources, of the environmental impacts of the proposed action and alternatives and a list of the agencies, interested groups and the public consulted. The document is to be concise for meaningful review and decision.

(c) *Integration with Corps Reports.* In the case of planning and/or engineering reports not requiring an EIS, the EA may be combined with or integrated into the report. The same guidance on combining or integrating an EIS within the report shall apply equally to an EA. Where the EA is combined with a Corps report or prepared as a separate document in the case of construction, operating projects and real estate actions requiring an EA, the EA normally should not exceed 15 pages.

## 33 CFR PART 320 – GENERAL REGULATORY POLICIES, CORPS OF ENGINEERS (1991)

### 33 CFR § 320.4 General policies for evaluating permit applications.

The following policies shall be applicable to the review of all applications for DA permits. Additional policies specifically applicable to certain types of activities are identified in 33 CFR Parts 321 through 324.

(a) *Public Interest Review.* (1) The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water

supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people. For activities involving 404 discharges, a permit will be denied if the discharge that would be authorized by such permit would not comply with the Environmental Protection Agency's 404(b)(1) guidelines. Subject to the preceding sentence and any other applicable guidelines and criteria (see §§ 320.2 and 320.3), a permit will be granted unless the district engineer determines that it would be contrary to the public interest.

(2) The following general criteria will be considered in the evaluation of every application:

(i) The relative extent of the public and private need for the proposed structure or work;

(ii) Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and

(iii) The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited.

* * *

## 33 CFR PART 325 – PROCESSING OF DEPARTMENT OF THE ARMY PERMITS (1991)

### 33 CFR § 325.7 Modification, suspension, or revocation of permits.

(a) *General.* The district engineer may reevaluate the circumstances and conditions of any permit, including regional permits, either on his own motion, at the request of the permittee, or a third party, or as the result of periodic progress inspections, and initiate action to modify, suspend, or revoke a permit as may be made necessary by considerations of the public interest. In the case of regional permits, this reevaluation may cover individual activities, categories of activities, or geographic areas. Among the factors to be considered are the extent of the permittee's compliance with the terms and conditions of the permit; whether or not circumstances relating to the authorized activity have changed since the permit was issued or extended, and the continuing adequacy of or need for the permit conditions; any significant objections to the authorized activity which were not earlier considered; revisions to applicable statutory and/or regulatory authorities; and the extent to which modification, suspension, or other action would adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit.

* * *

**33 CFR PART 325**

**APPENDIX B – NEPA IMPLEMENTATION PROCEDURES FOR THE REGULATORY PROGRAM, CORPS OF ENGINEERS, (1991)**

* * *

7. *EA/FONSI Document.* (See 40 CFR 1508.9 and 1508.13 for definitions) – a. *Environmental Assessment (EA) and Findings of No Significant Impact (FONSI).*

* * *

When the EA confirms that the impact of the applicant's proposal is not significant and there are no "unresolved conflicts concerning alternative uses of available resources * * * " (section 102(2)(E) of NEPA), and the proposed activity is a "water dependent" activity as defined in 40 CFR 230.10(a)(3), the EA need not include a discussion on alternatives. In all other cases where the district engineer determines that there are unresolved conflicts concerning alternative uses of available resources, the EA shall include a discussion of the reasonable alternatives which are to be considered by the ultimate decision-maker. The decision options available to the Corps, which embrace all of the applicant's alternatives, are issue the permit, issue with modifications or deny the permit. Modifications are limited to those project modifications within the scope of established permit conditioning policy (See 33 CFR 325.4). The decision option to deny the permit results in the "no action" alternative (i.e. no activity requiring a Corps permit). The combined document normally should not exceed 15 pages and shall conclude with a FONSI (See 40 CFR 1508.13) or a determination that an EIS is required.

* * *

## 40 CFR CHAP. V – COUNCIL ON ENVIRONMENTAL QUALITY (1991)

**40 CFR § 1502.9 Draft, final, and supplemental statements.**

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

* * *

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

* * *

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

* * *

**40 CFR § 1502.14 Alternatives including the proposed action.**

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

**40 CFR § 1506.5 Agency responsibility.**

(a) *Information*. If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§ 1502.17). It is the intent of this paragraph

that acceptable work not be redone, but that it be verified by the agency.

(b) *Environmental Assessments.* If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.

* * *

**40 CFR § 1508.1 Terminology.**

The terminology of this part shall be uniform throughout the Federal Government.

**40 CFR § 1508.2 Act.**

"Act" means the National Environmental Policy Act, as amended (42 U.S.C. 4321, *et seq.*) which is also referred to as "NEPA."

**40 CFR § 1508.3 Affecting.**

"Affecting" means will or may have an effect on.

**40 CFR § 1508.7 Cumulative Impact**

"Cumulative Impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future action regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

**40 CFR § 1508.8 Effects.**

"Effects" include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

**40 CFR § 1508.9 Environmental assessment.**

"Environmental assessment":

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

**40 CFR § 1508.13 Finding of no significant impact.**

"Finding of no significant impact" means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

**40 CFR § 1508.14 Human Environment.**

"Human Environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated,

then the environmental impact statement will discuss all of these effects on the human environment.

**40 CFR § 1508.27 Significantly.**

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) *Context*. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity*. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect district, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

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**46 Fed. Reg. 18026, 18037 (1981), Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ's NEPA Regulations.**

36a Q. How long and detailed must an environmental assessment (EA) be?

A. The environmental assessment is a concise public document which has three defined functions. (1) It briefly provides sufficient evidence and analysis for determining whether to prepare an EIS; (2) it aids in agency's compliance with NEPA when no EIS is necessary, i.e., it helps to identify better alternatives and mitigation measures; and (3) it facilitates preparation of an EIS when one is necessary. Section 1508.9(a).

Since the EA is a concise document, it should not contain long descriptions or detailed data which the agency may have gathered. Rather, it should contain a brief discussion of the need for the proposal, alternatives to the proposal, the environmental impacts of the proposed action and alternatives, and a list of agencies and persons consulted. Section 1508.9(b).

While the regulations do not contain page limits for EA's, the Council has generally advised agencies to keep the length of EAs to not more than approximately 10-15 pages. Some agencies expressly provide page guidelines (e.g., 10-15 pages in the case of the Army Corps). To avoid undue length, the EA may incorporate by reference background data to support its concise discussion of the proposal and relevant issues.

36b Q. Under what circumstances is a lengthy EA appropriate?

A. Agencies should avoid preparing lengthy EAs except in unusual cases, where a proposal is so complex that a concise document cannot meet the goals of Section 1508.9 *and* where it is extremely difficult to determine whether the proposal could have significant environmental effects. In most cases, however, a lengthy EA indicates that an EIS is needed.

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